Evrard v Denis
2020 NY Slip Op 33071(U)
September 17, 2020
Supreme Court, New York County
Docket Number: 158549/2018
Judge: Marcy Friedman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

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JOHN EVRARD,

Plaintiff,

- v -

ALEXANDRE DENIS, AD HOLDING SARL, JEAN-LOUIS COSTES, JACOB SEBAG ASSOCIATES P.C., CODEEV (USA) HOLDING INC.

Defendant.

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INDEX NO. 158549/2018

MOTION DATE 09/05/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HON. MARCY S. FRIEDMAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 15, 17, 18, 19, 20, 21, 22

were read on this motion to/for DISMISS.

This action arises out of an alleged scheme to fraudulently deprive plaintiff John Evrard of a valuable business opportunity to develop and run a high-end restaurant inside certain Saks Fifth Avenue department stores. Defendants move to dismiss the complaint on the ground of forum non conveniens pursuant to CPLR 327 (a). They also seek dismissal based on documentary evidence pursuant to CPLR 3211 (a) (1), for failure to state a cause of action pursuant to CPLR 3211 (a) (7), and for failure to plead fraud with particularity pursuant to CPLR 3016. For the reasons set forth below, the court holds that the motion should be granted on the ground of forum non conveniens.

Plaintiff John Evrard is a French national residing in London, England. (Complaint, ¶ 2, [NYSCEF Doc. No. 1].) Plaintiff entered into an agreement with defendant Jean Louis Costes, also a French national residing in France, to develop hotel and restaurant projects. (Id., ¶¶ 4, 15.) To this end, plaintiff and Costes formed Costes Etudes et Projets SAS (Costes LLC) under the laws of France. (Id., ¶¶ 8, 16.) Plaintiff and Costes each held a 50% interest in Costes LLC as of

June 2, 2014. (Id., ¶ 16.) In January 2015, Saks Fifth Avenue approached plaintiff about developing restaurants in New York City and California. (Id., ¶ 19.) To take advantage of this opportunity, in August 2016, plaintiff and Costes formed defendant CODEEV, a Delaware corporation, with its principal place of business in New York. (Id., ¶¶ 7, 20.) Plaintiff and Costes each held a 33% membership interest in CODEEV through Costes LLC, while defendant Alexandre Denis, also a French national, held the remaining 33% of CODEEV through AD Holding SARL (AD Holding), a company formed under the laws of France. (Id., ¶¶ 3, 6, 21, 22, 55.) CODEEV was appointed manager of the Saks restaurants, while plaintiff was designated as Manager's Agent. (Id., ¶¶ 23-24). Plaintiff alleges that he "agreed to serve as Manager's Agent without specific compensation only because he would receive returns from the project through his interest in CODEEV." (Id., ¶ 24.)

In early 2017, Denis and Costes allegedly tried to convince plaintiff to resign his position as Vice President of CODEEV by sending plaintiff an undated "Action by Written Consent" of CODEEV's Board of Directors, requesting that plaintiff sign and return a letter of resignation. (Id., ¶ 31.) Plaintiff refused to sign and demanded corrective action. (Id., ¶ 34.) Counsel for CODEEV responded, advising plaintiff that the CODEEV Board would consider whether a change of management was needed but that there would be no impact on "direct or indirect share ownership" of CODEEV. (Id., ¶ 35.)

In March 2018, Costes, acting as President of Costes LLC, transferred Costes LLC's shares of CODEEV to AD Holding for $100,000, with an earn-out component capped at $400,000 for four years of CODEEV's performance. (Id., ¶¶ 55-56; Aff. Of Eric Laut [Defs.' Atty] in Supp., ¶ 3 [NYSCEF Doc. No. 10].) This valuation was allegedly far below the "millions that the parties had previously estimated CODEEV would earn." (Compl., ¶ 56.)

Defendant Jacob Sebag Associates P.C. (Sebag) prepared the transaction documents which transferred the shares from Costes LLC to AD Holding. (Id., ¶ 49.) As a result of the transfer of shares, AD Holding became the sole shareholder of CODEEV. (Id., ¶ 40.) Denis then purported to act as President of CODEEV and to appoint Jacob Sebag as CODEEV's corporate secretary. (See id., ¶¶ 43-44.) According to the complaint, by means of this transaction defendants "intentionally deprived Evrard of his involvement and interest in CODEEV. With the assistance of Defendants Denis and Sebag, Defendant Costes transferred both his and Evrard's interest in CODEEV for a fraction of its value to Denis." (Id., ¶ 41.)

Plaintiff commenced this action in September 2018, alleging six causes of action for fraud, breach of fiduciary duty, aiding and abetting fraud, aiding and abetting breach of fiduciary duty, unjust enrichment, and misappropriation of skills and expenditures. (Id., ¶¶ 59-93.)

"'The doctrine of forum non conveniens permits a court to dismiss an action when, although it may have jurisdiction over a claim, the court determines that 'in the interest of substantial justice the action should be heard in another forum.'" (Elmaliach v Bank of China Ltd., 110 AD3d 192, 208 [1st Dept 2013], quoting National Bank & Trust Co. of N. Am. v Banco De Vizcaya, 72 NY2d 1005, 1007 [1988], cert denied 489 US 1067 [1989].) As the movants, defendants bear the "heavy burden of establishing that New York is an inconvenient forum and that a substantial nexus between New York and the action is lacking." (Elmaliach, 110 AD3d at 208 [internal quotation marks and citations omitted]; Viking Global Equities, LP v Porsche Automobil Holding SE, 101 AD3d 640, 641 [1st Dept 2012].)

It is well settled that in applying the forum non conveniens doctrine, the court

> "after considering and balancing the various competing factors must determine in the exercise of its sound discretion whether to retain jurisdiction or not. Among the factors to be considered are the burden on the New York courts, the potential hardship to the

> defendant, and the unavailability of an alternative forum in which plaintiff may bring suit. The court may also consider that both parties to the action are nonresidents and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction."

(Islamic Rep. of Iran v Pahlavi, 62 NY2d 474, 479 [1984], cert denied 469 US 1108 [1985] [internal citations omitted].) "No one factor is controlling." (Id.)

Here, defendants have met their "heavy burden" of establishing that New York is an inconvenient forum. Considering all of the factors relevant to the application of the forum non conveniens doctrine, the court holds that the action lacks a substantial nexus with New York.

The main parties to this dispute, plaintiff, Costes, and Denis, are all French nationals, with plaintiff and Costes residing abroad and Denis residing abroad and in California. (Compl., ¶¶ 2–4.) The nonresident status of parties to the action is a factor that may be considered in applying the forum non conveniens doctrine. (Pahlavi, 62 NY2d at 479.) Significantly, as discussed further below, the critical acts of the nonresident defendants occurred abroad. Contrary to plaintiff's assertion, although Sebag is a New York resident, its role in this action is tangential to the roles of Costes and Denis in the alleged wrongdoing. In addition, CODEEV, although a New York resident, acted through Costes and/or Denis. The residence of Sebag and CODEEV in New York accordingly does not provide a persuasive basis for retaining jurisdiction in New York. (See Fernie v Wincrest Capital, Ltd., 177 AD3d 531, 532 [1st Dept 2019] lv denied 35 NY3d 907 [2020]; Huani v Donziger, 129 AD3d 523, 523 [1st Dept 2015].)

The location of the wrongful conduct by the nonresident defendants weighs heavily in favor of dismissal. "[T]he foreign locus" of a cause of action is a factor that "militate[s] against retaining suit in New York." (World Point Trading PTE, Ltd. v Credito Italiano, 225 AD2d 153, 161 [1st Dept 1996]; see also Fernie, 177 AD3d at 531-32; Tilleke & Gibbins Intl., Ltd. v Baker

& McKenzie, 302 AD2d 328, 329 [1st Dept 2003] [noting that the location of the execution of the contract at issue is a factor in analysis of a forum non conveniens argument].) Plaintiff's principal claim in this action is that there was a fraudulent transfer of shares from one French company, Costes LLC, to another French company, AD Holding, each controlled by French nationals residing abroad, which deprived plaintiff of his interest in CODEEV. (See e.g., Compl., ¶¶ 65 [Fraud Cause of Action], 70 [Aiding and Abetting Fraud Cause of Action], 74 [Breach of Fiduciary Duty Cause of Action], 78 [Aiding and Abetting Breach of Fiduciary Duty Cause of Action], 84 [Unjust Enrichment Cause of Action], 87 [same], and 91 [Misappropriation Cause of Action].) It is undisputed that the Stock Purchase Agreement that transferred the interest in CODEEV from Costes LLC to AD Holding was executed in Paris. (Laut Aff., ¶ 3.)

Plaintiff claims that "[t]he actions at issue occurred in New York" and apparently asserts that the acts leading up to the transfer of the shares, including the demand for Evrard to resign as an officer of CODEEV, occurred in New York. (Pl.'s Memo. In Opp., at 11 [NYSCEF Doc. No. 20].) Plaintiff fails, however, to plead that such acts occurred in New York. At most, he asserts that the Stock Purchase Agreement was drafted in New York by Sebag, the New York attorney. (See id.) As noted above, however, even that agreement was indisputably executed in Paris. The record does not support a finding of a substantial nexus between the causes of action and New York.

The application of foreign law is another factor that supports dismissal upon the ground of forum non conveniens. While "our courts are frequently called upon to apply the laws of foreign jurisdictions" (Intertec Contr. A/S v Turner Steiner Intl., S.A., 6 AD3d 1, 6 [1st Dept 2004] [internal citations omitted]), it is also true that "the applicability of foreign law is an important consideration in determining a forum non conveniens motion and weighs in favor of

dismissal." (Flame S.A. v Wonderlink Intl (Holding) Ltd., 107 AD3d 436, 438 [1st Dept 2013]; Shin-Etsu Chem. Co., Ltd. v ICICI Bank Ltd., 9 AD3d 171, 178 [1st Dept 2004].) Here, as plaintiff acknowledges, the causes of action for breach of fiduciary duty and aiding and abetting such breach require the application of French fiduciary law. (Compl., ¶¶ 72, 77; see also Aff. of Antoine Chatain [Pl.'s Atty] in Opp., ¶¶ 21-26 [NYSCEF Doc. No. 19].)

Finally, although not required to support a forum non conveniens dismissal (Pahlavi, 62 NY2d at 481), there is an alternative forum, with a significant interest in the action, in which plaintiff may bring suit. French courts have been held to be suitable alternative forums, where the cases predominantly concerned the affairs of French corporations. (See Prime Props. USA 2011, LLC v Richardson, 145 AD3d 525, 525-26 [1st Dept 2016]; Adamowicz v Besnainou, 58 AD3d 546, 547 [1st Dept 2009].)

Here, plaintiff in fact initiated pre-trial discovery proceedings in France. (Chatain Aff., ¶ 15 ["In the case at hand, Mr. Evrard initiated a pre-trial evidentiary procedure to collect evidence of Mr. Costes' breach of fiduciary duty in his capacity as CEO of Costes LLC."].) The French court referred the matter to "conciliation" – a procedure for resolving a "potential dispute[] before the case is officially brought to the trial judge to be tried on the merits." (Id., ¶ 9.) Although plaintiff voluntarily discontinued the French proceeding prior to oral argument of the motion to dismiss this action (see July 30 Tr., at 6 [NYSCEF Doc. No. 23]), the French court is clearly an available forum for resolution of the claims in this action. The principal defendants, as French nationals, are amenable to jurisdiction in France; and both New York residents, Sebag and CODEEV, represented at oral argument that they would or have already consented to jurisdiction in a French proceeding. (Id., at 27.)

The court accordingly holds that this action should be dismissed on the ground of forum non conveniens. In view of this holding, the court does not address the other bases for dismissal.

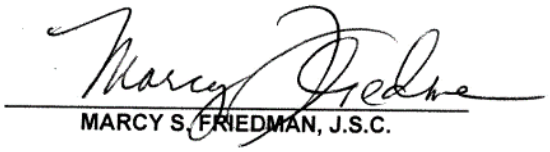
It is accordingly hereby ORDERED that the motion of defendants Alexandre Denis, AD Holding SARL, Jean-Louis Costes, Jacob Sebag Associates P.C., and CODEEV (USA) Holding Inc. to dismiss this action is granted to the following extent:

It is ORDERED that the branch of the motion to dismiss on the ground that New York is an inconvenient forum is granted; and it is further

ORDERED that this dismissal is conditioned on defendants' consent to submit to jurisdiction in France in the event that an action based on some or all of the claims in this action is commenced in France; and it is further

ORDERED that in the event of defendant(s)' failure to consent to submit to jurisdiction in France if an action based on some or all of the claims in this action is commenced in France, plaintiff may restore this action to the calendar of this Court provided that plaintiff promptly commenced the action in France and promptly seeks to restore this action upon defendant(s)' failure to consent to submit to jurisdiction in France.

This constitutes the decision and order of the court.



9/17/2020
DATE

MARCY S. FRIEDMAN, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE