Batash v Zarkadas

2021 NY Slip Op 32809(U)

December 22, 2021

Supreme Court, New York County

Docket Number: Index No. 654500/2020

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

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RECEIVED NYSCEF: 12/22/2021

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT:	HON. LOUIS L. NOCK	PART	38N	
	Justice)		
	X	INDEX NO.	654500/2020	
JON BATAS	SH, Plaintiff,	MOTION DATE	10/28/2020, 10/30/2020, 02/16/2021	
	- V -	MOTION SEQ. NO.	001 002 004	
MONIKA MA	TINOS ZARKADAS, EMMA ZARKADAS, AIELLANO, ANISH BERRY, and KRYOMED LI,	DECISION + C		
LLC,		MOTIC		
	Defendants.			
	X			
13, 14, 15, 26	e-filed documents, listed by NYSCEF document n 5, 28, 30, 31, 34, 35, 36, 37, 38, 39, 53, 54, 55, 56, 7, 88, 89, 90, 91, 92, 93, 94, 117, 159			
were read on	this motion for	DISMISSAL		
21, 22, 23, 24	g e-filed documents, listed by NYSCEF document 4, 25, 27, 29, 32, 33, 40, 68, 69, 70, 71, 72, 73, 74, 2, 123, 124, 125, 126, 127, 128, 129, 130, 158, 167	, 75, 76, 7 7, 78, 79, 8 0,		
were read on	this motion for	DISMISSAL		
	g e-filed documents, listed by NYSCEF document r 2, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152 5, 166			
were read on	read on this motion to CHANGE VENUE .		·	
LOUIS L. N	OCK, J.			
Upor	n the foregoing documents, and after argument	, it is determined as fo	llows.	
WHE	EREAS this court was informed at argument th	at the motions to dism	niss – sequence	
numbers 001	and 002 – are withdrawn, said motions are he	ereby denied as moot.1		
As fo	or motion sequence number 004, defendants m	ove for an order, purs	uant to CPLR	

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510, to change venue to Nassau County. Plaintiff commenced this action in New York County,

¹ Motion sequence number 003 had also been withdrawn, previously (see, NYSCEF Doc. No. 135).

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even though the contract upon which Plaintiff's claim is predicated (and which contract Plaintiff attached as an exhibit to his Complaint), clearly provides that venue for all disputes is fixed in Nassau County (*see*, NYSCEF Doc. No. 3). As such, venue based on contract provisions would require the action to be removed to Nassau County Supreme Court.

Furthermore, Plaintiff commenced this action in New York County, even though: (a) none of the events or activities described in the Complaint took place in New York County; (b) Plaintiff resides in Queens County; and (c) all of the defendants reside and/or are domiciled in Nassau County. As such, venue based on residence is not appropriate in New York County (*see*, CPLR § 503).

Defendants had informally requested, and thereafter, formally demanded from Plaintiff's counsel a change of venue to Nassau County pursuant to CPLR 511 (b); but that request and demand was refused.

Referring back to the ground based on contractual venue selection: the subject

Membership Purchase Agreement (NYSCEF Doc. No. 3) provides, at § 7.3 thereof, as follows:

Except in respect of any action commenced by a third party in another jurisdiction, the parties hereto agree that any legal suit, action, or proceeding against them arising out of or relating to this Agreement shall be brough exclusively in the United States Federal Courts or Nassau County Supreme Court, in the State of New York. The parties hereto hereby accept the jurisdictions of such courts for the purpose of any such action or proceeding and agree that venue for any action or proceeding brought in the State of New York shall lie in the Eastern District of New York or Supreme Court, Nassau County, as the case may be.

(Emphasis added.)

Notwithstanding the contract provision fixing venue, Plaintiff commenced the action in New York County. As the First department has recently stated in a similar matter, "[s]ince this action arises out of or relates to the duties and obligations under the agreement, the venue-selection

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clause applies, and defendant's motion [to change venue] should have been granted" (Medina v

Gold Crest Care Ctr., Inc., 117 AD3d 633, 634 [1st Dept 2014]).

Plaintiff attempts to downplay the significance of the parties' explicit venue selection clause by stating that the complaint's allegations of fraud ought to render the entire contract unenforceable, including its venue selection clause. But that argument is patently deficient for several reasons. First, the contract contains an express severability clause (section 7.1) which preserves the agreement's enforceability except to the extent that particular provisions within the agreement are deemed unenforceable. Second, the allegations of fraud are not directed at the venue clause itself (*see, British West Indies Guaranty Trust Co., Ltd. v Banque Internationale a Luxembourg*, 172 AD2d 234 [1st Dept 1991]). Third, if venue selection clauses could be vitiated through the simple expedient of an allegation of fraud, they could never provide the type of commercial stability that parties to contracts rely on when negotiating such clauses.

However, regardless of the venue selection clause, this court has already observed above that this action has no nexus to New York County, seeing as none of the events or activities described in the Complaint took place in New York County; Plaintiff resides in Queens County; and all of the defendants reside and/or are domiciled in Nassau County.²

Accordingly, it is

ORDERED that the defendants' motion for a change of venue is granted, and venue of this action is changed from this Court to the Supreme Court, County of Nassau; and it is further

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² Insofar as motion sequence numbers 001 and 002 included cross-motions by the Plaintiff for amendment of the complaint, Plaintiff may reinstitute such applications before Supreme Court, Nassau County, which will now serve as the venue of this action.

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the Supreme Court, County of Nassau and shall mark his records to reflect such transfer; and it is

further

ORDERED that, within 30 days from entry of this order, counsel for movant shall serve a

ORDERED that the Clerk of this Court shall transfer the file in this action to the Clerk of

copy of this order with notice of entry upon the Clerk of this Court, shall pay the appropriate

transfer fee, if any, and shall contact the staff of the Clerk of this Court and cooperate in

effectuating the transfer; and it is further

ORDERED that the Clerk of the Court shall coordinate the transfer of the file in this action

with the Clerk of the Supreme Court, Nassau County, so as to ensure an efficient transfer and

minimize insofar as practical the reproduction of documents, including with regard to any

documents that may be in digital format; and it is further

ORDERED that such service upon the Clerk of this Court shall be made in accordance with

the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for

Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address

www.nycourts.gov/supctmanh)].

This will constitute the decision and order of the court.

ENTER:

Jonis J. Wock

12/22/2021 DATE

LOUIS NOCK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

OTHER

APPLICATION:

SETTLE ORDER

GRANTED

DENIED

SUBMIT ORDER

GRANTED IN PART

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

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