SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Coda Octopus Group, Inc.

INDEX NO. 105600/2010
MOTION DATE 11/05/10
MOTION SEQ. NO. 002
MOTION CAL. NO.

- v -

Jody Eric Frank, Jason Reid, Richard Lewis, and Angus Loysdin

The following papers, numbered 1 to ____ were read on this motion to/for dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	6,8
Answering Affidavits — Exhibits	25-26
Replying Affidavits	29-30

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision.

Dated: 4/5/11

JUSTICE SHIRLEY WERNER KORNREICH
J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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CODA OCTOPUS GROUP, INC.,

Plaintiff,

- against -

JODY ERIC FRANK, JASON REID, RICHARD LEWIS, and ANGUS LUGSDIN,

Defendants.

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Index No.: 105600/2010

DECISION and ORDER

SHIRLEY WERNER KORNREICH, J.:

This case arises out of a dispute between plaintiff Coda Octopus Group, Inc. (the Company) and four of its former officers. Plaintiff alleges misappropriation of company funds, disclosure of confidential information and usurpation of corporate opportunity. It brings claims for breach of contract, breach of fiduciary duty, conversion, injunctive relief, an accounting, fraudulent inducement, and aiding and abetting the other defendants' wrongful conduct. Over the past several months, plaintiff has entered into stipulations of discontinuance with defendants Jody Eric Frank, Jason Reid, and Richard Lewis. The sole remaining defendant, Angus Lugsdin, moves to dismiss the action pursuant to CPLR 3211(a)(1), (3) and(7) and on the ground of *forum non conveniens*.

Background

Plaintiff alleges the following facts. Although plaintiff is a Delaware Corporation with its principal place of business in New Jersey, from its formation in 1994 until 2004, it operated as a private company based in the United Kingdom. It became a US corporation via a reverse merger through which it was acquired by The Panda Project. The Panda Project then changed its name

to Coda Octopus Group, Inc. The Company is in the business of developing and marketing "high quality software-based products used for underwater mapping, geophysical surveying and other related marine applications." Compl. Para. 7.

Lugsdin is a citizen of the United Kingdom and currently resides there. Tr. 7. He has asserted, without opposition, that he initially was hired in the UK by the Company or its UK subsidiary in November, 1998, and continued to work there until December 6, 2009. Tr. 4-5. Plaintiff alleges that Lugsdin was employed by the Company, pursuant to a written employment agreement, from July 1, 2005 until his termination on December 6, 2009. Compl. Para. 12. That 2005 employment agreement identifies Lugsdin as having an address in England. Obeid Affirm. Ex. B.

In the fall of 2009, the four defendants, all of whom held senior management positions in the Company, negotiated agreements with the Company to terminate their employment. In particular, on December 6, 2009, Lugsdin and the Company entered into an agreement (Compromise Agreement) ending his employment. The Compromise Agreement contains a forum selection clause which states that the "Parties irrevocably agree that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this Agreement or its subject matter or formation (including non-contractual disputes or claims)." Obeid Affirm. Ex. C. It also contains a choice of law provision which states that "This Agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the law of England and Wales." *Id.*

The next day, Lugsdin and the Company executed another agreement (Consultancy

Agreement), which called for him "to provide transitional services on a part time basis for a six or seventh month duration." Compl. Para. 17. By that time, defendants Reid and Lewis had already entered into substantially similar arrangements with the Company. The Consultancy Agreement provides that "[e]ach party irrevocably agrees to submit to the non-exclusive jurisdiction of the courts of England and Wales over any claim or matter arising under or in connection with this agreement," and a choice of law provision, which states that "This Agreement shall be governed by and construed in accordance with the law of England and Wales." Obeid Affirm. Ex. D.

As for the substance of the Agreements as they relate to this action, plaintiff asserts that each "contained material restrictive covenants regarding (a) the use of Company information, including, in particular, the use of confidential and proprietary information; (b) the return of Company property (including Company confidential and proprietary information) upon termination of employment; (c) the taking of any actions which might tarnish the Company's reputation; (d) the taking of any actions which were intended to or had the effect of competing with the Company; and (e) the solicitation of others (including Defendants) for the purposes of engaging in conduct contrary to the best interests of the Company." Compl. Para. 18.

Plaintiff's complaint alleges a pattern of wrongful activity by the defendants covering a period both before and after their signing of the Agreements. Briefly, it accuses them of misappropriating the Company's funds, wrongfully transferring confidential information to private equity firms in order to facilitate a potential acquisition of the Company, wrongfully transferring the Company's investor database and client mailing list to another corporation engaged in similar enterprises in which the defendants held management positions substantially

similar to those they held in the Company, and usurpation of corporate opportunity by forming another company "whose business purposes are to profit from underwater treasure finds located by the technology developed by [the Company.]" It alleges that these actions constituted breaches of various provisions of defendants' original employment, Compromise and Consultancy Agreements as well as breaches of the defendants' common law duties to the Company.

Lugsdin now moves to dismiss on three primary grounds. First, pursuant to CPLR 3211(a)(1), he submits a copy of the Compromise Agreement containing the forum-selection clause mentioned above. He argues that this provision requires that any claims arising under or related to the subject matter of the Compromise Agreement must be brought in the courts of England and Wales. To the extent that plaintiff's claims do not arise out of or relate to the subject matter of the Compromise Agreement, he argues that they should still be dismissed pursuant to the doctrine of *forum non conveniens* and instead be brought alongside the claims which must be brought in the UK under the Compromise Agreement's forum selection clause. Second, Lugsdin claims that, under BCL 1312, plaintiff lacks standing to sue because it is a "foreign corporation" and, therefore, the action should be dismissed pursuant to CPLR 3211(a)(3). Finally, Lugsdin seeks to have all of plaintiff's six causes of action dismissed pursuant to CPLR 3211(a)(7) as either duplicative or inadequately pled.

Discussion

Dismissal under CPLR 3211(a)(1) is warranted only if the documentary evidence conclusively establishes a defense to the asserted claims as a matter of law. *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-591 (2005); *accord 511 9th LLC v*

Credit Suisse USA, Inc., 69 AD3d 497 (1st Dept 2010).

"It is well-accepted policy that forum-selection clauses are *prima facie* valid." *British West Indies Guar. Trust Co., Ltd. v Banque Internationale A Luxemburg et al.*, 172 AD2d 234 (1st Dept 1991) citing *The Bremen v Zapata Off-Shore Co.*, 407 US 1, 12-18 (1972). The clause will be set aside upon a showing that enforcement is unreasonable and unjust, because of fraud or overreaching, or that a trial in the contractual forum would be so difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court. *Id.* Crucially, the fact that the opposing party seeks rescission on the grounds of fraudulent inducement is not sufficient to invalidate the contract's forum selection clause. *See Id.* Instead, the party opposing its enforcement must show that the inclusion of the clause itself was fraudulently induced. *Id.*

The doctrine of *forum non conveniens*, codified in CPLR 327 (a), "permits a court to stay or dismiss such actions where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere." *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-479 (1984), *cert denied*, 469 US 1108 (1985). New York courts consider the availability of an adequate alternative forum and certain other private and public interest factors when evaluating New York's nexus to a particular action and deciding whether to dismiss an action on the ground of *forum non conveniens*. *Id.* The burden is on the defendant challenging the forum to demonstrate the relevant private or public interest factors which militate against accepting the litigation. *Id.*; *Highgate Pictures, Inc. v De Paul*, 153 AD2d 126 (1st Dept 1990).

A motion to dismiss on the ground of *forum non conveniens* is subject to the discretion of the trial court and no one of the above factors is controlling. *Islamic Republic of Iran v Pahlavi*,

supra; *Matter of New York City Asbestos Litig. v Rapid American Corp.*, 239 AD2d 303 (1st Dept 1997). Although not every factor is articulated in every case, collectively, the courts consider and balance the following factors in determining an application for dismissal based on *forum non conveniens*: the existence of an adequate alternative forum; the situs of the underlying transaction; residency of the parties; the potential hardship to the defendant; the location of documents; the location of a majority of the witnesses; and the burden on New York courts. *Islamic Republic of Iran v Pahlavi, supra*; *World Point Trading PTE v Credito Italiano*, 225 AD2d 153 (1st 1997). One factor in gauging the burden on the court is whether or not foreign law must be applied.. *Fox v Fusco*, 4 AD3d 313 (1st Dept 2004). Moreover, New York courts are inclined to dismiss actions on the basis of *forum non conveniens* where there is prior related litigation pending in a foreign jurisdiction for the purpose of judicial economy and to avoid inconsistency. *Hart v General Motors Corp.*, 129 AD2d 179 (1st Dept 1987); *World Point Trading PTE*, *supra* at 161.

Section 12.2 of the Compromise Agreement unambiguously provides that any action arising out of it is subject to the exclusive jurisdiction of the courts of England and Wales. The fact that Section 20.2 of the subsequent Consultancy Agreement only grants those courts non-exclusive jurisdiction does not make the previously-mentioned clause any less unambiguous. Though it is not immediately apparent why the parties would have written them differently, these clauses are not inherently contradictory. Further, while plaintiff alleges that the contract was fraudulently induced by defendants' warranties as to his compliance with his preexisting Employment Agreement, nowhere in the complaint or in its opposition papers does plaintiff assert that the inclusion of the forum selection clause itself was fraudulently induced. Nor does

plaintiff make any showing as to why it would be unreasonable or unjust for plaintiff to have to pursue this action in England or Wales. As such, Section 12.2 of the Compromise Agreement should be enforced and the causes of action related to the Compromise Agreement are dismissed.

To the extent that plaintiff's claims do not arise out of or relate to the Compromise Agreement or its subject matter, this court may properly have jurisdiction over them. However, after undertaking the above *forum non conveniens* analysis, it is of the opinion that they would more properly be brought in the courts of England and Wales. The issues and facts are closely intertwined. Therefore, it would be an inefficient use of judicial resources for both this court and a court in the UK to resolve such interrelated claims and would create the possibility of inconsistent verdicts. Additionally, it is uncontested that Lugsdin now resides in England, and it is not clear whether he would even have the legal right to return to and stay in the U.S. Trans. 7. Also, plaintiff has made no showing that critical witnesses or documents are located in New York. Nor has New York been designated as the situs of Lugsdin's alleged wrongful acts. Further, while this court may be competent to apply foreign law, the courts of England and Wales have more expertise in applying the laws of their own country, which govern the instant disputes. Finally, given that plaintiff agreed to litigate claims under the Compromise Agreement only in the UK and agreed to submit to UK jurisdiction on claims under the Consultancy Agreement, the court finds unconvincing any argument that it would be unduly burdensome for plaintiff to litigate the entire dispute there or that it could not have reasonably expected that it might be forced to do so.

As all of plaintiff's causes of action are dismissed pursuant to CPLR 3211(a)(1) and on the ground of *forum non conveniens*, the court need not reach defendant's arguments seeking

dismissal pursuant to CPLR 3211(a)(3) and (7). Accordingly, it is hereby

ORDERED that defendant Angus Lugsdin's motion to dismiss is granted on the condition that within 60 days from the date of this order, defendant shall serve and file a stipulation agreeing that if within one year plaintiff institutes an action in the courts of England or Wales for determination of the claims asserted in the instant action, defendant will appear and submit to the jurisdiction of the courts of England or Wales in that action and shall stipulate to waive any Statute of Limitations defense in that action to the extent that the applicable Statute of Limitations had not yet expired prior to institution of the instant action; and it is further

ORDERED that defendant shall file proof of compliance with the above condition with the Clerk of the Part and with the County Clerk (Room 300), together with a copy of this order with notice of entry and proof of service of the foregoing on counsel for plaintiff; and it is further

ORDERED that, upon the timely filing of the foregoing, the County Clerk shall enter judgment dismissing the action; and it is further

ORDERED that, in the event of non-compliance, counsel are directed to appear for a status conference in Room 228, 60 Centre Street, on June 14, 2011, at 9:30 AM.

Dated: 4/5/11

Enter: _____ J.S.C.