

At a Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Supreme Court, in the City of Binghamton, New York on the 20th day of December, 2006

PRESENT: HONORABLE JEFFREY A. TAIT
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

WALVEK, S.A., Individually and derivatively on
behalf of Boston Laser, Inc,

Plaintiff,

DECISION AND ORDER

vs.

Boston Laser, Inc., Adhance, Inc., and Aharon
Meytahyl,

Index No. 2006-2003
RJI No. 2006-1470-M

Defendants.

APPEARANCES:

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HON. JEFFREY A. TAIT, J.S.C.

The defendants move to dismiss this action in the interests of justice pursuant to New York Civil Practice Law and Rules §327, contending that this action should be venued in another court not in the State of New York. Such a motion is also often referred to as a motion to dismiss on forum non conveniens grounds. Plaintiff opposes the motion, asserting that there are sufficient contacts with the Broome County area where it commenced the action and that venue here is proper.

It is fair to say that this is not an everyday action commonly brought in Broome County Supreme Court. The underlying facts involve venture capital, numerous corporate entities, allegations of improper corporate conduct, and corporate governance and individuals and entities with international origins, presence, and contact.

According to the complaint, the plaintiff Walvek, S.A., (“Walvek”) a Luxembourg company,¹ is a principal shareholder in and lender to defendant Boston Laser, Inc., a Delaware corporation (“BLI”). The other defendants are Adhance, Ltd., (“Adhance”) a British Virgin Islands corporation and another principal shareholder in BLI, and Aharon Meytahl², an individual residing in Broome County who allegedly controls both BLI and Adhance. The complaint demands the following relief: a) a \$1,702,314.00 money judgment against Adhance in favor of

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Defendants point out that Walvek, S.A. is controlled by Mario Ferrario, a citizen and resident of Italy.

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He is a citizen of Israel.

Walvek; b) a judgment ordering Adhance to return 8,511.57 shares of BLI to Walvek or in the alternative a money judgment of at least \$1,702,314.00; c) a money judgment of at least \$1,702,314.00 against BLI in favor of Walvek; d) a money judgment of at least \$390,000.00 against BLI in favor of Walvek; and e) a money judgment of at least \$708,760.00 against Meytahl in favor of Walvek derivatively on behalf of BLI.

In addition to this action, there are two other actions pending. One is venued here in Broome County and the other is pending in the Chancery Court of the State of Delaware, New Castle County. In the other Broome County action, the plaintiff is Boston Semiconductor Laser, Inc. ("Boston Semi") and the defendants are BLI and the Broome County Industrial Development Agency ("BCIDA"). This action challenges the transfer of property, on which BLI has its offices and physical operations, from the BCIDA to BLI.³ In the Delaware action, the plaintiff is BLI and the defendant is Mario Carlo Ferrario. That action contends that Ferrario, in his capacity as a director of BLI, breached certain duties to BLI, defrauded BLI, and abused legal process by commencing baseless litigation. It also seeks judgment declaring that Aktis, Inc. is a holder of shares of BLI.

Why is this action brought in New York State Supreme Court in Broome County, New York? BLI has its principal office in Broome County at 15 Link Drive, Binghamton, New York. The defendant Meytahl resides in Vestal, New York, also in Broome County. BLI has operations and employees in Broome County at the Link Drive location.

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It contends that the entity with the right to obtain title to the property from BCIDA is really Boston Semi.

The basis of the present motion is CPLR §327, which provides that upon motion a court may stay or dismiss an action in whole or in part on any conditions that may be just where it finds in the interest of substantial justice that the action should be heard in another forum. As defendants point out, the courts of this state are not under any obligation to be burdened by litigation that has little substantial nexus to New York.

The lead case on this issue is *Islamic Republic of Iran v. Pahlavi*, where the Court of Appeals identified the following factors to be considered on a motion to dismiss on forum non conveniens grounds: 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 (*see id.*, 62 NY2d 474, 479 [1984]). Also considered is the non-residence of both parties and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction (*see id.*). While the defendant has the burden to show that these factors warrant dismissing the litigation on this basis, the Court noted that the plaintiff must be able to show more than its own convenience when the forum selected imposes a heavy burden on the court and the defendant (*see id.*).⁴

A common theme in situations where an action is dismissed on forum non conveniens grounds is a minor or minimal contact with New York. Much, perhaps most, of the negotiation and structure of the transaction occurred outside New York by citizens or entities of other

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While there is some authority in the Third Department that the plaintiff may bear the burden to show special circumstances warranting the retention of jurisdiction, those cases involve motor vehicle accidents and may be limited to that situation (*see Mensah v. Moxley*, 235 AD2d 910 [3d Dept 1997], *Blais v. Deyo*, 92 AD2d 998, 999 [3d Dept 1983] *aff'd* 60 NY2d 679 [1983], *but cf. Bank Hapoalim (Switzerland) Ltd. v. Banca Intesa SPA*, 26 AD3d 286 [1st Dept 2006]).

jurisdictions. However, the end result of the negotiations and structure of the transaction by these foreign citizens and entities was the acquisition and use of assets in this jurisdiction, with actual business operations, employees, and commerce here. The result is that many of the activities that will be the subject of this action occurred in this jurisdiction and some (perhaps not all) of the documents, witnesses that will be testifying, and activities that will be the subject of testimony will be located here or describing events that occurred here.

The amended complaint alleges claims against: 1) BLI for breach of a share purchase agreement by failing to pay Walvek for shares BLI received; 2) BLI for unjust enrichment for retaining the shares without paying for them; 3) BLI for conversion for retaining the shares without paying for them; 4) Meytahl for aiding and abetting conversion by assisting Adhance in not paying for the shares; 5) BLI for aiding and abetting conversion of the shares by registering and reflecting the transfer of the shares on its books; 6) BLI for default in its obligations under the lease with Boston Semiconductor Laser, Inc.⁵ (“Boston Semi”); 7) BLI and Meytahl for fraud in the procurement of a deed from the BCIDA; 8) BLI for failure to repay a loan to Walvek; 9) BLI for account stated by reason of the Walvek loan; and 9) Meytahl for breach of fiduciary duty to BLI.

The core issues in dispute in this action focus on ownership of the shares of BLI and compliance with agreements in that regard. The amended complaint adds to this action a claim regarding title to the real property in Broome County on which BLI conducts its operations. As stated earlier, Meytahl is a resident of Broome County. The added claim regarding title to

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Boston Semiconductor Laser, Inc. was added as a party plaintiff in the amended complaint.

property in Broome County is something that without question is proper subject matter for an action brought in this county. As to the other claims that were in the original complaint and remain in the amended complaint, the focus is on ownership of the corporation that has its only physical location and operation within this jurisdiction.

While the court is not aware of precedent with identical or nearly identical facts, there is precedent for the proposition that the existence of some physical presence and some ties to the chosen jurisdiction supports denial of a motion pursuant to CPLR §327 even if the underlying agreements were entered in a different jurisdiction (not the case here) and the parties are citizens of a different jurisdiction (the case here). For example, in litigation over insurance coverage, New York was a proper forum and a motion to dismiss under CPLR §327 was denied where the landfill site for which coverage was at issue was in New York, even though the insurance policy was issued in Missouri⁶ (*Price v. Brown Group, Inc.*, 206 AD2d 195, 201 [4th Dept 1994]).

Cases cited in support of the motion differ in material respects from the situation here.

In *Glaser v. Kratz*, the court granted the motion to dismiss noting that, “[t]he only nexus to New York is that Plaintiff and one of the Defendants resides here” (*see id.*, 13 Misc3d 1222(A) at *4 [Sup Ct, Nassau County 2006]).

In *Glen & Co. v. Popular Leasing USA, Inc.*, a motion to dismiss on forum non conveniens grounds was granted even though plaintiff was a New York resident, the alleged fraud and misrepresentation were alleged to have occurred in New York, and the equipment was

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It is interesting to note that the moving defendant was a New York corporation which, by its motion, was seeking to have the claim litigated in Missouri. Defendant preferred to litigate the matter in Missouri where it had acquired the policy and where it had 17 landfill sites.

located in New York (*see id.*, 12 Misc3d 1163(A) [Sup Ct, Westchester County 2006]). A key and very unique factor in that case was that 530 other similar actions were pending in Missouri by the moving party, approximately 40 of those actions were against New York residents, and all of the actions involved the same issues as the New York action (*see id.* at *2). This was a truly unique situation. Here, there is no jurisdiction in which such a volume of related or similar issues are pending or will in the future be commenced.

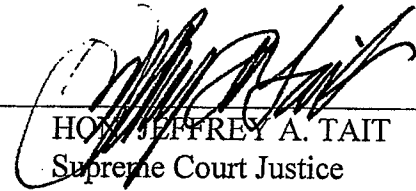
In *Citigroup Global Markets, Inc. v. Metals Holding Corp.*, the plaintiff was merely a stakeholder seeking to resolve a claim between two parties to assets held by plaintiff (*see id.*, 12 Misc3d 1168(A) [Sup Ct, New York County 2006]). As plaintiff was not a real party in interest, it was logical and proper to have the action brought in a forum more convenient and suitable to the real parties in interest.

It is true that a contest over ownership interests in a corporation might be appropriately litigated in a number of forums where, as here, the entities have their origin in a variety of different jurisdictions. The physical operations of the entity whose ownership is contested are located in this jurisdiction. The breach of lease and fraud claim concern real estate on which those operations are conducted in this jurisdiction. A key party lives and works in this jurisdiction. These facts establish that fundamental fairness and sensible, effective judicial administration support allowing this action to proceed in this forum. Based in the foregoing, the motion is denied.

This Decision shall also constitute the Order of the Court pursuant to rule 202.8(g) of the Uniform Rules for the New York State Trial Courts and it is deemed entered as of the date

below. To commence the statutory time period for appeals as of right (CPLR 5513[a]), a copy of this Decision and Order, together with notice of entry, must be served upon all parties.

Dated: February 20, 2007
Binghamton, New York



HOV. JEFFREY A. TAIT
Supreme Court Justice

The following papers were filed with the Clerk of the County of Broome:

- Notice of Motion of Aswad & Ingraham dated October 31, 2006, Affidavit of Yvonne Curtis, sworn to October 26, 2006, Affidavit in Support of Motion of Charles O. Ingraham, Esq., sworn to October 31, 2006 with attached Exhibits A and B
- Affidavit of Service by Mail of Dianne Deeter, sworn to October 31, 2006
- Supplemental Affidavit in Support of Motion of Charles O. Ingraham, Esq., sworn to December 19, 2006 with attached Exhibits A through E