SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49
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SWISSGEM S.A. and GENEVAGEM S.A.,

Plaintiffs,

-against-

M&B LIMITED,

Defendant.
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DECISION AND ORDER
Index No. 654225/2019

Motion Sequence No: 001

O. PETER SHERWOOD, J.:

In motion sequence 001, defendant M&B Limited ("M&B" or "defendant") moves to dismiss the complaint. For the following reasons, the motion is granted on grounds of *forum non conveniens* and plaintiffs' complaint is conditionally dismissed.

I. BACKGROUND

As this is a motion to dismiss, the following facts are taken from the complaint. Plaintiffs Swissgem S.A. and GENEVAGEM S.A. ("plaintiffs") are affiliated foreign diamond corporations. Defendant M&B Limited is a Hong Kong entity. On September 28, 2018, 24 round brilliant diamonds with an approximate valuation of $18 million were stolen from plaintiffs in Geneva, Switzerland (the "theft") (Compl. ¶ 5 [NYSCEF Doc. No. 1]). Plaintiffs reported the theft to the Swiss Police and a police report was filed on October 4, 2018 (*id.* ¶ 6). Plaintiffs also notified the Gemological Institute of America, Inc. ("GIA") regarding the theft of the diamonds, providing the GIA with a list of the stolen diamonds together with each diamond's corresponding GIA grading report number, and advising them that the thieves might try to re-cut the diamonds into smaller diamonds and resubmit them to GIA for grading (*id.* ¶¶ 7–8). Plaintiffs and the Swiss Police Judicial Prosecutor's office requested that GIA flag these diamonds as stolen and alert plaintiffs in the event of resubmission (*id.*).

One of the stolen diamonds was a 21.14 carat round brilliant cut diamond with a Grading Report from GIA under Certificate Report No. 5182121395 (the "Diamond") (*id.* ¶ 9). Prior to the

theft, plaintiffs had submitted the Diamond to the GIA for analysis, grading and certification and a report was issued on January 19, 2017 (*id.* ¶¶ 13–14). At some point after the theft, the Diamond was recut and reconstituted as a 20.33 carat round brilliant cut diamond which was subsequently obtained by defendant M&B Limited and, in April 2019, the Diamond was submitted to GIA for analysis (*id.* ¶¶ 17–18). GIA's analysis revealed that the stone submitted by M&B was the same Diamond stolen from plaintiffs (*id.* ¶ 19). In April 2019, GIA informed plaintiffs M&B had submitted the Diamond (*id.* ¶ 20). Plaintiffs have since demanded return of the Diamond which M&B has denied (*id.* ¶ 21). GIA has secured the Diamond at its laboratory in New York pending resolution of the ownership claims (*id.* ¶ 22).

As against defendant M&B, plaintiffs assert claims of declaratory judgment, failure to purchase in good faith, and replevin.

II. ARGUMENTS

A. Defendant's Arguments

Defendant begins by arguing it purchased the Diamond at issue from its own shop in Hong Kong and sent it to GIA to receive official grading before being alerted that plaintiff was claiming ownership over it and that GIA would retain possession of the Diamond pending resolution of the dispute (Def. Br. at 1 [NYSCEF Doc. No. 11]). On July 17, 2019, defendant brought an action in Hong Kong for declaratory judgment as to ownership of the Diamond (*id.*). Defendant argues plaintiffs ignored the Hong Kong action and instead brought this action for the same purpose (*id.*).

Defendant contends this court lacks jurisdiction over defendant (Def. Br. at 5 [NYSCEF Doc. No. 11]). Plaintiffs maintain New York has long arm jurisdiction over defendant pursuant to CPLR § 302 (a), which states:

> "a [New York] court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:
>
> 1) transacts any business within the state or contracts anywhere to supply goods or services in the state; or
>
> 2) commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
>
> 3) commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act… or

4) owns, uses or possesses any real property situated within the state"

(CPLR § 302 [a]).

Defendant argues plaintiffs can only allege jurisdiction pursuant to CPLR § 302 (a)(1) as the complaint does not allege any claims arising in tort, ruling out the application of CPLR 302 (a)(2) or (3), and nothing here concerns real property, ruling out CPLR 302 (a)(4). Defendant further argues CPLR § 302 (a)(1) is only applicable if the defendant has engaged in "purposeful business activities" within the state and if there is a "substantial relationship" between those specific business activities and the plaintiff's causes of action (Def. Br. at 6; *see Talbot v Johnson Newspaper Corp.*, 71 NY2d 827, 829 [1988]; *O'Brien v Hackensack University Medical Center*, 305 AD2d 199 [1st Dept 2003]; *Golden Gulf Corp. v Jordache Enter. Inc.*, No. 91 Civ. 8506, 1994 WL 62384 [SD NY 1994]). Defendant argues that plaintiffs' claims arise from events taking place outside of the United States as the Diamond's theft took place in Switzerland and defendant's acquisition of the Diamond occurred in its Hong Kong shop (Def. Br. at 7). Accordingly, defendant argues that not only did it not have "purposeful business activities" within New York State, but any such activities are irrelevant in this suit (*id.*). Defendant contends that merely sending the Diamond to the GIA in New York is far from the CPLR § 302 (a) required nexus necessary between plaintiffs' claims and the transaction conducted (s*ee Sunward Electronics, Inc. v McDonald*, 362 F3d 17, 25 [2d Cir. 2004]). According to the defendant, plaintiffs' claims have no connection with defendant sending the Diamond to GIA to be graded and such an attenuated connection between the claims and New York cannot form the basis for jurisdiction over a foreign entity (see *McKee Elec. Co. v Rauland-Borg Corp.*, 20 NY2d 377, 383 [1967] ["we should not forget that defendants, as a rule, should be subject to suit where they are normally found, that is, at their pre-eminent headquarters, or where they conduct substantial business activities"]). Defendant argues that "the mere receipt by a nonresident of a benefit or profit from a contract performed by others in New York is clearly not an act by the recipient in this State sufficient to confer jurisdiction under [New York's] long-arm statute" (*Ehrenfeld v Bin Mahfouz*, 9 NY3d 501, 511 [2007]).

As to plaintiffs' claim for replevin, defendant argues GIA will "comply with any and all requests from a law enforcement agency [or] court having jurisdiction over GIA" regarding the Diamond's ownership and that GIA is subject to jurisdiction in Hong Kong (Leiby Aff., Ex.

D [NYSCEF Doc. No. 8]). Defendant argues that since GIA would comply with a Hong Kong court order directing return of the Diamond to the rightful owner, the Diamond's location is irrelevant to this action (Def. Br. at 8–9).

Defendant next argues that, should the court find it has CPLR § 302 (a) jurisdiction over defendant, plaintiffs' complaint should be dismissed based on *forum non conveniens* as there are at least two forums, Switzerland and Hong Kong, which have greater interests in adjudicating this matter as plaintiffs' claims arise from events in these venues, and a pending action regarding the Diamond's ownership already exists in Hong Kong (*id.* at 9).

When considering a dismissal pursuant to *forum non conveniens*, courts consider: (i) the existence of an adequate alternative forum; (ii) situs of the underlying transaction; (iii) residency of the parties; (iv) potential hardship to the defendant; (v) location of documents; (vi) location of a majority of the witnesses; and (vii) the burden on New York courts (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 477, 478 [1984]). As to existence of an alternative forum, defendant points to the ongoing suit in Hong Kong. The First Department has previously found the Hong Kong court to be an adequate alternative forum (s*ee Tetra Fin. (HK) Limited v Patry*, 115 AD2d 408, 409 [1st Dept 1985]).

As to the underlying transaction's situs, defendant points out the alleged theft occurred in Geneva, Switzerland and the Diamond was purchased by defendant in Hong Kong (Def. Br. at 10). Defendant further states that documents and witnesses relating to plaintiffs' claim that defendant was not a good faith purchaser are also located in Switzerland and Hong Kong, making production of witnesses and documents in a New York suit burdensome for defendant (*id.* at 10–11). Defendant argues New York has no interest in adjudicating this matter as neither plaintiffs nor defendant are residents of New York (*see Garmendia v O'Neill*, 46 AD3d 361, 362 [1st Dept 2007]; *Phat Tan Nguyen v Banque Indosuez*, 19 AD3d 292, 295 [1st Dept 2005]; *Al Nyman & Son, Inc. v United States Lines, Inc.*, 44 AD2d 516, 516 [1st Dept 1974]; *Tetra fin. (HK) Limited v Patry*, 115 AD2d 408, 409 [1st Dept 1985]; *Crowley v Guardsmark, Inc.*, 64 AD2d 593, 593 [1st Dept 1978]).

Finally, defendant requests that, should this court not dismiss the complaint, the action be stayed pending resolution of the Hong Kong case pursuant to CPLR § 2201 as Hong Kong is the proper venue to ascertain whether plaintiff acquired good title to the Diamond (Def. Br. at 12–13).

B. Plaintiffs' Arguments

Plaintiffs urge the court to deny defendant's motion because M&B is subject to personal jurisdiction in New York pursuant to CPLR § 302 (a)(1) (Pl. Br. at 1 [NYSCEF Doc. No. 23]). A defendant's physical presence in New York is not needed to obtain personal jurisdiction under CPLR § 302 (a)(1) but, instead, proof of just one transaction in New York is sufficient to invoke jurisdiction provided that the defendant's activities were purposeful and a substantial relationship between the transaction and the claim asserted exists (*id.* at 2; *see Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65 [Ct. App. 2006]; *Kreutter v McFadden Oil Corp.*, 71 NY2d 460).

Plaintiffs assert the complaint plainly alleges M&B transacts business in New York by regularly sending diamonds to be professionally graded at GIA's offices in New York (Pl. Br. at 3; Compl. ¶ 3). Plaintiffs argue the complaint further states M&B specifically sent the Diamond to GIA's New York offices for grading in April 2019 and that, upon analysis, GIA determined the Diamond was the same stolen from plaintiff (Compl. ¶¶ 18, 19, 22–23). Consequently, plaintiffs argue the complaint alleges facts sufficient to warrant personal jurisdiction over M&B in New York as M&B voluntarily sent the Diamond from Hong Kong to New York (Pl. Br. at 4). Plaintiffs argue M&B concedes these facts in the affidavit of M&B's principal, Roi Sheinfeld (*id.*; Sheinfeld Aff. [NYSCEF Doc. No. 7]). Plaintiffs argue GIA sent multiple correspondences to Mr. Sheinfeld from GIA's New York office advising him as to the Diamond's contested ownership (Pl. Br. at 4–5; Richman Aff. [NYSCEF Doc. No. 15]).

Plaintiffs further argue M&B transacts business in New York as it regularly sends other diamonds and precious stones from Hong Kong to GIA's New York office for grading, thus establishing that M&B transacts business in New York and should be subject to personal jurisdiction in New York courts (Pl. Br. at 5–6; Leiby Aff., Ex. D [NYSCEF Doc. No. 8]; *see House of Diamonds v Borgioni*, 737 FSupp2d 162 [SD NY 2010]). Plaintiffs argue M&B's marketing as a "global presence," specifically in New York, constitutes an admission that M&B is

an active participant in New York's diamond market, regularly transacting business in New York State (Pl. Br. at 6; Richman Aff., Ex. C [NYSCEF Doc. No. 18]).

Plaintiffs next argue that the exercise of personal jurisdiction over M&B would comport with due process as it is self-evident there is a substantial relationship between M&B's business transactions and plaintiffs' claims (Pl. Br. at 8–9). Plaintiffs contend that because this matter pertains to a dispute between the parties as to the Diamond's ownership, it is clear there is a substantial relationship between the lawsuit and M&B's act of sending the Diamond to GIA in New York (*id.*). Plaintiffs argue the act of sending the Diamond to GIA allowed GIA to flag the Diamond as stolen and led to plaintiffs filing this action and, had M&B not sent the Diamond to New York for grading, this action would not exist (*id.* at 9–10). Plaintiffs further argue that exercise of personal jurisdiction over M&B would comport with due process as M&B purposefully availed itself of the forum by sending the Diamond from Hong Kong to New York and, consequently, defendant should reasonably expect to defend its actions in New York (*id.* at 10).

Plaintiffs next argue that jurisdictional discovery is warranted in this matter as they have made a "sufficient start" in establishing that this jurisdiction is not frivolous (*id.* at 10–11; *American BankNote Corp. v Daniele*, 45 AD3d 338 [1st Dept 2007]; *Peterson v Spartan Industries, Inc.*, 33 NY2d 463 [Ct. App. 1974]). Plaintiffs contend that a defendant claiming that it does business in New York has previously constituted a "sufficient start" to warrant jurisdictional discovery (Pl. Br. 11; *Venegas v Capri Clinic*, 147 AD3d 457 [1st Dept 2017]; *Candero v Del Virginia*, 2019 NY Misc. LEXIS 733 [Sup Ct New York County 2019]).

Plaintiffs argue the prong of the motion seeking dismissal based on *forum non conveniens* should be denied as the burden is on defendant to establish New York is an inappropriate forum and M&B has failed in this regard (*id.* at 13; *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478 NYS2d 597 [Ct. App. 1984]; *Banco Ambrosiano, S.p.A. v Artoc Bank & Trust, Ltd.*, 62 NY2d 65 [Ct. App. 1984]; *OrthoTec, LLC v Healthpoint Capital, LLC*, 84 AD3d 702 [1st Dept 2011]). Plaintiffs argue a primary factor in having an action proceed in New York is whether the property in dispute is in New York, as is the case with the Diamond (*see Anagnostou v Stifel*, 204 AD2d 61 [1st Dept 1994]; *Johnson v Golia*, 2016 NY Misc. LEXIS 708 [Sup Ct New York County 2016]). Litigating a case in New York does not impose an undue

hardship on a defendant who specifically chooses to direct business activity towards New York (*see High St. Capital Partners, LLC v ICC Holdings, LLC*, 2019 NY Misc. LEXIS 2415 [Sup Ct New York County 2019]; *Republic of Lebanon v Sotheby's* [167 AD2d 142 [1st Dept 1990] [holding that defendants who intentionally avail themselves of New York for business purposes cannot claim New York is an inconvenient forum]).

Plaintiffs argue that the presence of documents and witnesses in other forums is not a significant consideration when a defendant fails to produce names or provide any basis other than speculation to believe testimony will be unobtainable in New York (*see Anagnostou v Stifel*, 204 AD2d 61 [1st Dept 1994]; *Lerner v Friends of Mayanot Inst., Inc.*, 126 AD3d 431 [1st Dept 2015]) Because GIA is currently housing the Diamond in New York, all of GIA's documents and witnesses relating to the Diamond are in New York (Pl. Br. at 17). Plaintiffs argue, given New York's reputation as a "world-renowned center for art and culture," New York has a vested interest in protecting its stream of commerce from stolen goods (*see Solomon R. Guggenheim Foundation v Lubell*, 77 NY2d 311; *Gowen v Helly Nahmad Gallery, Inc.*, 77 NYS3d 605 [Sup Ct New York County 2018]). Plaintiffs argue that court should ignore any argument that the case should not proceed here as foreign law may be applied because New York courts are "fully equipped" to apply foreign laws if necessary (*see American BankNote Corp. v Daniele*, 45 AD 3d 338 [1st Dept 2007]).

Plaintiffs argue that, while defendant may have filed a suit in Hong Kong on July 17, 2019, the suit was only against GIA and Montalbano Adjustment Services, Inc., not plaintiffs (Pl. Br. at 19; Leiby Aff., Ex. E [NYSCEF Doc. No. 9]), and that, instead, a new Hong Kong suit was filed on September 18, 2019, naming plaintiffs here as defendants (Leiby Aff., Ex. F [NYSCEF Doc. No. 10]). This New York action is valid as it was commenced months prior to M&B naming plaintiffs as a party to the Hong Kong action (Pl. Br. at 19). Plaintiffs argue Hong Kong is not an available alternate venue for this matter as plaintiffs do not maintain any contacts with Hong Kong and are not subject to jurisdiction in Hong Kong (*id.*).

Finally, plaintiffs argue this action should not be stayed pursuant to CPLR § 2201, as there is no complete identity of the parties in the two actions and plaintiffs are not amenable to jurisdiction in Hong Kong (*id.* at 20–21; *Somoza v Pechnik*, 3 AD3d 394 [1st Dept 2004]; *Green Tree Fin. Servicing Corp. v Lewis*, 280 AD2d 642 [2d Dept 2001]; *Guilden v Baldwin Sec. Corp.*, 189 AD2d 176 [1st Dept 1993]).

C. Defendant's Reply

Regarding *forum non conveniens*, defendant argues this action must be dismissed because courts in Hong Kong or Switzerland have greater interests in adjudicating this dispute than those in New York, and an action already exists in Hong Kong (Def. Reply at 7). The GIA has nothing to do with plaintiffs' claims and "it is unclear" that the GIA is holding the Diamond in New York (*id.*). Defendant argues it has not availed itself of New York jurisdiction as plaintiffs have failed to allege a single act that took place in New York (*id.* at 8). Defendant never sold the Diamond in New York and never intended to use New York to sell the Diamond, distinguishing plaintiffs' citation of *Republic of Lebanon v Sotheby's* (*id.*; *Republic of Lebanon v Sotheby's*, 167 AD2d 142, 143 [1990]). Defendant reiterates this action should be adjudicated in Switzerland or Hong Kong, "where the actual facts, witnesses and discovery lie" (*id.* at 9).

III. DISCUSSION

CPLR 3211 [a] [8] provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the court has not jurisdiction of the person of the defendant." When presented with a motion under CPLR 3211 [a] [8], "the party seeking to assert personal jurisdiction, the plaintiff[,] bears the ultimate burden of proof on this issue" *Marist Coll. v Brady*, 84 AD3d 1322, 1322-1323 (2d Dept 2011). The party opposing a motion to dismiss need not state all the facts necessary to establish jurisdiction. If evidence of the facts establishing jurisdiction are in the exclusive control of the moving party, CPLR 3211 [d] only requires a "sufficient start," demonstrating that such facts "may exist" (*see HBK Master Fund L.P. v Troika Dialog USA, Inc.*, 85 AD3d 665 [1st Dept 2011], citing *Peterson v Spartan Industries, Inc.*, 33 NY2d 463, 467 [1974]).

Here, defendant's motion to dismiss on the basis of lack of personal jurisdiction is denied as plaintiffs have successfully shown that, pursuant to CPLR § 302 (a)(1), defendant M&B transacts business within New York, purposefully availing itself of the benefits and protections of transacting within the state.

On a motion to dismiss on the ground of *forum non conveniens*, the defendant challenging the forum bears the burden of demonstrating relevant private or public interest factors which militate against accepting the litigation (*see Islamic Republic of Iran*, 62 NY2d at 479; *Straville v Land Cargo, Inc.*, 39 AD3d 735, 736 [2d Dept 2007]). The doctrine rests upon principles of justice, fairness, and convenience (*see Islamic Republic of Iran*, 62 NY2d at 479). Among the factors to

be considered are "the residency of the parties, the potential hardship to proposed witnesses, the availability of an alternative forum, the situs of the underlying action, and the burden which will be imposed upon New York courts, with no one factor controlling" (*Straville*, 39 AD3d at 736, [internal quotation marks omitted]).

Here, defendant M&B has met its heavy burden. First, plaintiffs, Swiss corporations, complain of acts that occurred outside of New York, specifically in Switzerland and Hong Kong. To the extent plaintiffs allege acts occurred in New York, specifically sending the Diamond to be graded by the GIA, such acts do not provide a substantial nexus to the New York forum or to plaintiffs' causes of action for declaratory judgment, failure to purchase in good faith, and replevin. Further, the documents and witnesses relating to their claims are primarily located in Switzerland and Hong Kong. Finally, Hong Kong is an available and satisfactory alternative forum in which defendant has already begun an action for the same remedies. Consequently, plaintiffs' complaint should be dismissed as against defendant on the grounds of *forum non conveniens*. The court conditions this dismissal upon defendant M&B accepting service by electronic means on its New York or Hong Kong counsel. Further, absent stipulation by the parties, the Diamond shall remain in possession of the GIA in New York pending direction of the court in Hong Kong having jurisdiction over the matter and parties.

Accordingly, it is hereby

ORDERED that, if defendant accepts service by electronic means on its New York or Hong Kong counsel, the motion of defendant to dismiss the complaint is GRANTED on grounds of *forum non conveniens* and otherwise DENIED; it is further

ORDERED that the Diamond shall remain in the possession of the GIA in New York pending either a stipulation of the parties to this action or the direction of the court in Hong Kong having jurisdiction over the matter and parties; it is further

ORDERED that within 30 days from service of a copy of this order with notice of entry, defendant shall file proof of compliance with the above condition with the Clerk of Part 49 and with the Clerk of the Court, 60 Centre Street, Room 141B together with a copy of this order with notice of entry and proof of service of the foregoing on counsel for plaintiffs; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the Part shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically filed cases; and it is further

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

ORDERED that in the event of non-compliance, counsel for the parties are directed to appear for a status conference on Tuesday, July 9, 2020 at 9:30 AM at Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

ENTER:

O. P. Sherwood

J.S.C.

O. PETER SHERWOOD

DATED: May 4, 2020