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

AM PITT HOTEL, LLC, Plaintiff, - against – 400 5TH AVE., L.P., Defendant.	Index No. 652792/2018 (Motion Seq. No. 001) Hon. Saliann Scarpulla

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

PRYOR CASHMAN LLP
7 Times Square
New York, New York 10036
(212) 421-4100
Attorneys for Plaintiff

Of Counsel:
Todd E. Soloway
Lisa M. Buckley
Jason S. Mencher

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(s)**

STATUTES

Plaintiff AM Pitt Hotel, LLC ("Plaintiff" or "AM Pitt"), by its attorneys Pryor Cashman LLP, respectfully submits this Memorandum of Law in opposition to the motion of defendant 400 5th Ave., L.P. ("Defendant" or "Core" in its capacity as the general partner of 400 5th Ave., LP) seeking to dismiss Plaintiff's Complaint pursuant to CPLR 3211(a)(8), or, in the alternative, pursuant to CPLR 327(a) (the "Motion").

PRELIMINARY STATEMENT

This is an action brought by New York-based AM Pitt against Core for breach of contract. Core seeks to have the case dismissed for lack of personal jurisdiction, or alternatively, because Pennsylvania supposedly is a more convenient forum. As demonstrated below, Core is subject to personal jurisdiction in New York and Pennsylvania is not a more convenient forum for AM Pitt.

More specifically, AM Pitt is owned 95% by The Melohn Group, a large privately-held real estate company headquartered in New York City. BigStore Hotel Partners LLC ("BigStore"), a New York limited liability company located in New York, holds a minority interest in AM Pitt and is the leaseholder and operator of the hotel asset.

In 2014, one of Core's employees traveled to New York to meet with The Melohn Group's VP of Alternative Investments in New York in search of an investor to open a hotel in a building that Core was acquiring. The Melohn Group agreed to make the investment and in a purchase and sale agreement dated November 24, 2015, The Melohn Group acquired two and a half floors in Core's building and subsequently signed a hotel management agreement with the owner of the EVEN-brand hotels. The Melohn Group engaged in numerous telephonic communications with Core from New York. Drafts of the purchase and sale agreement had been

sent to The Melohn Group in New York. The Melohn Group executed the purchase and sale agreement in New York.

At Core's urging, the purchase and sale agreement was amended three times, once in 2016 and twice in 2017. The transaction was the foundation for the continuing relationship between the parties: AM Pitt will not fully realize tax credits to which it is entitled for five years after the hotel opens for business.

The facts of this case are strikingly similar to the facts presented in Bank of India v. Essar Steel Holdings Ltd., 2017 WL 4284557, at *2, 2017 N.Y. Slip Op. 32032(U), 4–5 (Sup. Ct. N.Y. Cnty. 2017) (Scarpulla, J.), in which this Court denied defendant's motion to dismiss plaintiff's action for breach of contract on jurisdictional grounds, concluding that the foreign defendant purposely availed itself of the privilege of transacting business in New York where the defendant "reached into New York to negotiate and then execute the contracts" with plaintiff, "subsequently negotiated seven extensions and modifications" of the agreement over a period of years and the "transaction was the foundation for the continuing relationship between the parties." Just as it did in Bank of India, this Court should deny Defendant's motion to dismiss this action for lack of personal jurisdiction.

Moreover, Pennsylvania is not a convenient forum for AM Pitt, which is located in New York. New York law is clear that a plaintiff's choice of forum is entitled to significant weight. New York has an interest in protecting the rights of its citizens. Core's conduct has caused harm to AM Pitt and The Melohn Group in New York.

Based on the foregoing facts, Defendant's motion should be denied in its entirety.

STATEMENT OF FACTS

Defendant Initiated The Investment Made By AM Pitt

Core Realty, Inc. (Core) is a real estate development firm that sources real estate deals and solicits potential investors. (Affidavit of Akiva Feinsod sworn to on August 7, 2018 ("Feinsod Aff.") at ¶ 3). Core is the general partner of 400 5th Ave. (Id.). In late 2014, Randy Mineo, a Core employee, traveled to New York to meet with New York resident Akiva Feinsod, the VP of Alternative Investments at The Melohn Group, a large family-owned and operated real estate company headquartered in New York City. (Id. at ¶ 5). The two met at Prime Grill located in midtown Manhattan. (Id.). At the meeting Mr. Mineo told Mr. Feinsod that Core was working on behalf of the new ownership of the Kaufmann's Building (the "Building") which was seeking an investor to acquire space in the Building for purposes of building and operating a hotel there. (Id. at ¶ 4).

Mr. Feinsod brought the investment opportunity presented by Mr. Mineo to The Melohn Group and then spent the next few months evaluating it. (Id. at ¶¶ 5-6). After due consideration, The Melohn Group agreed to pursue the investment. (Id. at ¶ 6). Core was fully aware that all decisions concerning the investment were made by The Melohn Group in New York. (Id. at ¶ 14).

In June 2015, Core closed on the acquisition of the Kaufmann's Building. (Id. at ¶ 4). AM Pitt was formed as the vehicle through which The Melohn Group would acquire space in the Building and construct the interior of the hotel. (Id. at ¶ 6). AM Pitt is owned 95% by The Melohn Group. (Id.). BigStore Hotel Partners LLC ("BigStore"), a New York limited liability company located in New York, is the leaseholder and operator of the asset owned by AM Pitt. (Id.).

Defendant's Contacts With New York

In November of 2015, AM Pitt and 400 5th Ave. entered into an Agreement of Sale ("Sale Agreement") pursuant to which AM Pitt acquired the fifth and sixth floors and part of the first floor of the Building and agreed to build and operate a boutique hotel there under the EVEN brand. (Id. at ¶ 7). The purchase price to acquire the space was $8 million. (Id.). Yet The Melohn Group's investment far exceeded just the purchase price. (Id.). From New York, The Melohn Group obtained a $14.9 million construction loan to build out the hotel space using a New York-based broker. (Id.). Also from New York, The Melohn Group negotiated and entered into a hotel management agreement with IHG Management (Maryland) LLC, the brand owner.

The Sale Agreement required that Core establish and deliver to AM Pitt a "gray shell" by the "completion date," August 24, 2016, at which point AM Pitt's own contractor for the interior hotel space could begin its work. (Id. at ¶ 9). Core did not come close to meeting that deadline, or the extended deadlines agreed to in three separate amendments to the Sale Agreement. (Id. at ¶ 10). In fact, Core's construction of the Building still has not been completed, preventing AM Pitt from opening the hotel for business. (Id.).

As Core's construction on the Building was increasingly late, by the time of the closing on the hotel space, The Melohn Group's original financing had expired. (Id. at ¶ 11). The Melohn Group had to obtain bridge financing. (Id.). The work The Melohn Group conducted to procure the new financing all was performed in New York. (Id.). The financing issues also were a topic of numerous telephone calls between Mr. Feinsod in New York and Michael Samschick and David Fisher from Core. (Id. at ¶ 12). Some of those calls were initiated by Mr. Feinsod from New York and, at other times, Messrs. Samschick and Fisher called Mr. Feinsod in New York. (Id.).

Throughout the pre-construction and construction periods, Matthew Shollar, a representative of BigStore and The Melohn Group, has been on site at the Building virtually every day, engaging in constant communications with Core concerning the progress of the construction on the Building (or lack thereof). (Id. at ¶ 13). Mr. Shollar reports the information to The Melohn Group in New York. It is The Melohn Group that makes all decisions relating to Core. (Id.).

The Complaint

In June of 2018, AM Pitt commenced this action, alleging several causes of action based upon Core's material breaches of the Sale Agreement, as amended. Core's construction on the Building is now two years behind schedule. As a result, AM Pitt has been unable to open the hotel for business. AM Pitt has been required to continue paying interest on its loans financing the acquisition and construction of the hotel space for months longer than anticipated under the terms of the parties' contract. False starts based on Core's repeated commitment to construction deadlines that it consistently failed to meet has increased AM Pitt's pre-opening costs under its hotel management agreement with the hotel manager. Additionally, AM Pitt has been deprived of profits it would have earned had the hotel opened on time. (Complaint at ¶¶ 18, 55, 67, 98, 119, 125, 127-28, 136, 144 (NYSCEF Doc. No. 1)). In short, AM Pitt has suffered millions of dollars of liquidated, compensatory and consequential damages as a result of Core's material breaches of contract. (Id.).

ARGUMENT

Core seeks to dismiss this breach of contract action purportedly because this Court lacks personal jurisdiction over it. Alternatively, Core seeks to have the case dismissed on the purported grounds that Pennsylvania is a more convenient forum because the Building, and the

evidence, are located there. Core's motion to dismiss should be denied. Core solicited The Melohn Group, headquartered in New York, to acquire space in the Building and open a hotel there, thus purposely availing itself of the benefits of doing business in New York.

Although Core makes much of the fact that the location of the Building is in Pittsburgh, the location of the Building is irrelevant in this breach of contract case concerning Core's delay in completing its construction. The Building is not evidence. There is no dispute regarding the status of the construction, or that the construction has been delayed for two years. Copies of the relevant documents were sent to The Melohn Group in New York, including contracts, correspondence, completion notices, meeting minutes, and the like. Moreover, given electronic discovery, the location of documents is insignificant. Although Core's witnesses may be in Pennsylvania, AM Pitt's witnesses are in New York.

In sum, Core is subject to personal jurisdiction in New York. Under the case law and the facts, Pennsylvania is not a more convenient forum than New York. And, Plaintiff's choice of New York as the forum for this action is entitled to substantial weight. Accordingly, Core's motion to dismiss should be denied in its entirety.

I. DEFENDANT'S MOTION TO DISMISS SHOULD BE DENIED

A. Legal Standard on a Motion to Dismiss

Pleadings subject to a CPLR 3211 motion to dismiss are "afforded a liberal construction, and the facts therein are accepted as true, the plaintiff is accorded the benefit of all possible inferences, and the court determines only if the facts alleged fit within any cognizable legal theory." Bank of India, 2017 WL 4284557, at *2 (quoting Leon v. Martinez, 84 N.Y.2d 83, 87–88 (1994)).

"The facts alleged in the complaint and affidavits in opposition to such a motion to dismiss [for lack of jurisdiction] are deemed true and construed in the light most favorable to the plaintiff, and all doubts are to be resolved in [plaintiff's] favor." Weitz v. Weitz, 926 N.Y.S.2d 305 (2d Dep't 2011) (citation omitted).

"While the ultimate burden of proof lies with the party asserting jurisdiction, to successfully oppose a motion to dismiss for lack of personal jurisdiction, the plaintiff need only make a prima facie showing that the defendant was subject to the personal jurisdiction of the court." Bank of India, 2017 WL 4284557, at *2 (citation and quotations omitted); Petroleum v. Trifigura AG, 2016 WL 4529038, at *3, 2016 N.Y. Slip Op. 31656(U), 5 (Sup. Ct. N.Y. Cnty. 2016) (Scarpulla, J.), aff'd sub nom. Deadco Petroleum v. Trafigura AG, 151 A.D.3d 547, 58 N.Y.S.3d 16 (1st Dep't 2017) ("In opposing the motion, the plaintiff is not required to make a prima facie showing of jurisdiction, but only a 'sufficient start' in demonstrating a basis for personal jurisdiction over the defendant 'to warrant further discovery.'")

B. Defendant is Subject to Personal Jurisdiction in New York

Defendant is subject to personal jurisdiction in New York. Core initiated the transaction with The Melohn Group in New York. A Core employee traveled to New York to meet with The Melohn Group's VP of Alternative Investments in New York. Representatives of The Melohn Group engaged in numerous telephonic communications with Core from New York. The Melohn Group instructed its attorneys from New York. Drafts of the Sale Agreement and subsequent amendments were sent to The Melohn Group in New York. The Melohn Group executed the Sale Agreement and subsequent amendments in New York. The Melohn Group arranged funding for the transaction from New York. The Melohn Group's representative on the ground at the Building site communicates with The Melohn Group in New York regarding the

status of Core's construction on the Building. All decisions concerning the investment are made by The Melohn Group in New York.

Ignoring all of these facts, Core argues that this Court lacks personal jurisdiction because it is not alleged to have committed a tortious act within New York and thus allegedly has insufficient minimum contacts with New York. (NYSCEF Doc. No. 13 ("Br.") at pp. 7–8.) But that is not the only basis for the exercise of personal jurisdiction over a non-domiciliary defendant. CPLR 302(a)(1) authorizes the exercise of personal jurisdiction over any non-domiciliary who "transacts any business within the state or contracts anywhere to supply goods or services in the state."

New York courts have interpreted CPLR 302(a)(1) as requiring a plaintiff to establish that: 1) defendant purposely availed itself of the "privilege of conducting activities within the forum State," and 2) plaintiff's claim has an "articulable nexus" with defendant's transaction of business in the forum state. D&R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro, 29 N.Y.3d 292, 297-299 (2017) (citation and quotations omitted).

Proof of even a *single act* in New York is sufficient to invoke jurisdiction, so long as that act meets both prongs of the above test. Deutsche Bank Secs., Inc. v. Montana Bd. of Invs., 7 N.Y.3d 65, 71 (2006). Once the requirements of CPLR 302(a)(1) are satisfied, a court must determine if the exercise of jurisdiction under New York's long-arm statute comports with the requirements of federal due process. D&R Global, 29 N.Y.3d at 300.

Here, Defendant's contact with New York meets both of the requirements of CPLR 302(a)(1), and jurisdiction by this Court comports with federal due process requirements.

1. **Defendant Has Purposely Availed Itself of New York**

Core incorrectly contends that this Court lacks personal jurisdiction because "no representative from 400 5th Ave. ever traveled to New York to negotiate the Sale Agreement...the Development Agreement...or any amendments thereto." (Affidavit of Michael Samschick at ¶ 3 (NYSCEF Doc. No. 14)). Akiva Feinsod, on the other hand, specifically recalls Randy Mineo from Core traveling to New York City to meet with Mr. Feinsod to determine if Mr. Feinsod had any interest in making an investment in the Building. All doubts are to be resolved in favor of AM Pitt.

Even if, *arguendo*, none of Core's representatives traveled to New York, this Court still has personal jurisdiction over Defendant because its transaction of business in New York was purposeful. See Al Rushaid v. Pictet & Cie, 28 N.Y.3d 316, 323 (2016); Fischbarg v. Doucet, 9 N.Y.3d 375, 381 (2007). Core, on its own initiative, solicited an investor from New York. D&R Global, 29 N.Y.3d at 298 (purposeful availment exists where, on its own initiative, the non-domiciliary projects itself into this state to engage in sustained and substantial transaction of business) (citation and quotations omitted).

Core's voluntary decision to engage in a transaction with The Melohn Group demonstrates its intention to avail itself of the benefits of doing business in New York. See Fischbarg, 9 N.Y.3d at 380 (efforts to establish an attorney-client relationship from outside the state constituted "transaction of business" for the purposes of jurisdiction); Al Rushaid, 28 N.Y.3d at 328 (holding that the defendants' choice to wire money through a New York bank account to distribute to employees in Geneva constituted an active engagement with New York).

In Bank of India, 2017 WL 4284557, at *6-7, this Court denied defendant's motion to dismiss plaintiff's action for breach of contract on jurisdictional grounds, concluding that

plaintiff, a New York branch of an Indian banking corporation, had met its prima facie burden of demonstrating that its claim arose from the overseas defendant's transaction of business in New York. The Court found that the foreign defendant purposely availed itself of the privilege of transacting business in New York where defendant "reached into New York to negotiate and then execute the contracts" with plaintiff, "subsequently negotiated seven extensions and modifications" of the agreement over a period of years, and that the "transaction was the foundation for the continuing relationship between the parties." Id.

Here, as in Bank of India, AM Pitt satisfies its prima facie burden of demonstrating that its breach of contract claims arose from Defendant's transaction of business in New York. In 2014, Core reached into New York through numerous telephonic and e-mail communications to negotiate and execute an agreement with New York-based AM Pitt, pursuant to which AM Pitt acquired space in a building owned by Core in which to open a hotel. Additionally, a Core employee traveled to New York to meet with one of Plaintiff's representatives to pitch the transaction. See e.g., C. Mahendra (N.Y.), LLC v. National Gold & Diamond Ctr., Inc., 125 A.D.3d 454, 457–58 (1st Dep't 2015) (telephonic communications are sufficient to confer jurisdiction where the contacts are purposeful and complex); see Bank of India, 2017 WL 4284557, at *6-7.

After the initial transaction finalized in November of 2015, Core reached out to AM Pitt in 2016 and 2017 to negotiate and execute three separate amendments to the parties' original agreement. The transaction was the foundation for the continuing and long-term relationship between the parties. The Building acquired by Core is an historic site, and as a result of its renovation of the space it acquired, AM Pitt qualifies for Federal Historic Tax Credits or "rehabilitation tax credits." However, AM Pitt will not fully realize its tax credits for five years

after the hotel opens for business. See Wilson v. Dantas, 128 A.D.3d 176, 182 (1st Dep't 2015), aff'd, 29 N.Y.3d 1051 (2017) (execution of a shareholder agreement with a New York entity set the grounds for a continuing relationship between the parties and constituted the transaction of business in New York); D&R Global, 29 N.Y.3d at 299 (defendant transacted business in New York by entering into exclusive distribution agreement with a New York distributor).

Thus, Core has purposely availed itself of transacting business in New York by initiating and entering into an agreement establishing a long-term relationship with a New York company, traveling to New York to meet with The Melohn Group, and engaging in numerous telephonic communications with The Melohn Group concerning the transaction.

2. Defendant's Transaction of Business in New York Has an "Articulable Nexus" with Plaintiff's Claims

The requirement that a defendant's transaction of business in New York have an "articulable nexus" with plaintiff's causes of action is "relatively permissive." D&R Global, 29 N.Y.3d at 299. An articulable nexus exists where at least "one element" of plaintiff's cause of action "arises from the New York contacts." Id. (citation and quotations omitted); Al Rushaid, 28 N.Y.3d at 329. Here, there is no question that AM Pitt's causes of action alleging that Core breached the Sale Agreement, as amended, have an articulable nexus with Core's transaction of business in New York.

3. The Exercise of Personal Jurisdiction Over Defendant Comports with Federal Due Process Requirements

The exercise of personal jurisdiction over a non-domiciliary defendant must comport with federal due process. The New York Court of Appeals has recognized that a non-domiciliary's solicitation of business from a New-York based plaintiff is sufficient to establish minimum contacts necessary to satisfy federal due process. Deutsche Bank, 7 N.Y.3d at 72.

And further, a non-domiciliary that projects itself into the State "using electronic and telephonic means may be subject to personal jurisdiction without offending due process." Id. at 71; Fischbarg, 9 N.Y.3d at 385 (same).

Here, Core solicited an investment from The Melohn Group in New York. Randy Mineo traveled to New York City to meet with The Melohn Group's VP of Alternative Investments in New York to pitch the investment. Messrs. Samschick and Fisher engaged in numerous telephonic negotiations with The Melohn Group in New York. Moreover, Core was fully aware that all decisions were made by The Melohn Group in New York. The Melohn Group provided or arranged funding of the transaction from New York. Under the case law, the exercise of personal jurisdiction over Core comports with federal due process.

In sum, the exercise of personal jurisdiction over Core is neither unreasonable nor unjust because Core could foresee that it would need to defend a lawsuit in New York. D&R Global, 29 N.Y.3d at 299; Wilson, 128 A.D.3d at 186; LaMarca v. Pak-Mor Mfg. Co., 95 N.Y.2d 210, 217–218 (2000) ("Pak-Mor had every reason to foresee that its *self-initiated contact* with New York raised the prospect of defending this suit.") (emphasis added).

Once a plaintiff demonstrates that a non-domiciliary defendant has minimum contacts with New York, the burden shifts to defendant to "present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." LaMarca, 95 N.Y.2d at 217–18 (citation and quotations omitted). Core has not met that burden. The location of the Building is irrelevant. The choice of law provision in the Sale Agreement pointed to by Core undercuts Core's motion.[1] (Br. at pp. 1, 7-9.) The parties chose not to include a forum selection clause in the Sale Agreement.

[1] That the agreements contemplate Pennsylvania Law to apply has minimal jurisdictional implications. "Choice of law provisions have minimal jurisdictional implications....Accordingly, a plaintiff may acquire personal jurisdiction

C. This Court Should Not Dismiss the Complaint Pursuant to CPLR 327(a)

Core's request that the Court dismiss the action under CPLR § 327(a) on the purported ground that Pennsylvania is a more convenient forum should be denied. *Forum non conveniens* "rests upon considerations of justice, fairness and convenience." Islamic Rep. of Iran v. Pahlavi, 62 N.Y.2d 474, 479 (1984). Relevant considerations include: "the residency of the parties and convenience of potential witnesses, the situs of the actionable events, the location of evidence, the availability of an alternative forum and the burden on the New York court if the case is retained." Rachel's Children Reclamation Found., Inc. v. Elon., 49 Misc. 3d 1208(A), at *11 (Sup. Ct. Kings Co. 2015) (citation omitted).

The court also may consider "the potential hardship to the defendant," and "unavailability of an alternative forum in which plaintiff may bring suit." Islamic Rep. of Iran, 62 N.Y.2d at 479. Courts also consider New York's interest in deciding the case, *i.e.*, because plaintiff is a New York domiciliary, and the cause of action has a connection to New York. Id. No one factor is controlling.

On a motion to dismiss under CPLR § 327(a) defendant bears the burden on the motion of demonstrating the existence of "relevant private or public interest factors which militate against accepting the litigation." Islamic Rep. of Iran, 62 N.Y.2d at 479; Sambee Corp. v. Moustafa, 628 N.Y.S.2d 664, 664 (1st Dep't 1995) (reversing motion court's dismissal of action on *forum non conveniens* grounds because New York courts would not be burdened); Creditanstalt Inv. Bank AG v. Chadbourne & Parke LLP, 788 N.Y.S.2d 104, 105 (1st Dep't 2005) (motion court properly "considered and balanced the various competing factors set forth in [Islamic Rep. of Iran], properly concluding that defendant did not satisfy its *heavy burden* of

---

over a nondomiciliary even though a court may be required to apply the law of a sister State." Alan Lupton Assocs., Inc. v. Ne. Plastics, Inc., 482 N.Y.S.2d 647, 652 (4th Dep't 1984) (citation omitted).

demonstrating New York is not a convenient forum for this action") (emphasis added) (citation omitted).

Indeed, even "[t]he fact that another forum may have a substantial interest in adjudicating an action is but one factor to be weighed on a CPLR 327 dismissal motion." Aon Risk Servs. v. Cusack, 958 N.Y.S.2d 114, 116 (1st Dep't 2013) (holding that lower court's denial of motion to dismiss on *forum non conveniens* grounds was not abuse of discretion) (citation omitted). Further, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." Anagnostou v. Stifel, 611 N.Y.S.2d 525, 525 (1st Dep't 1994) (citations omitted).

Here, AM Pitt's choice of forum is entirely proper and should be afforded significant weight. Anagnostou, 611 N.Y.S.2d at 525. Defendant has failed to satisfy its heavy burden of demonstrating that New York is not a convenient forum for this action, and thus, this Court should not dismiss this action pursuant to CPLR 327(a).

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that Defendant's motion be denied in its entirety.

Dated: New York, New York
August 7, 2018

PRYOR CASHMAN LLP
Attorneys for Plaintiff

By: _____
Todd E. Soloway
Lisa M. Buckley
Jason S. Mencher
7 Times Square
New York, New York 10036
(212) 421-4100