SHORT FORM ORDER

INDEX
NO.: 23578-07

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 5-24-12
SUBMITTED: 5-24-12
MOTION NO.: 005-MOT D

GLOBAL MARINE POWER, INC.,

Plaintiff,

-against-

KUSTOM ENGINES & PERFORMANCE ENGINEERING, LLC, KEITH EICKERT, and KUSTOM ENGINES, LLC, WILLIAM PYBURN and BPR PERFORMANCE LLC,

Defendants.

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Upon the following papers numbered 1-8 read on these motion to dismiss ; Notice of Motion and supporting papers 1-6 ; Notice of Cross Motion and supporting papers____; Answering Affidavits and supporting papers 7 ; Replying Affidavits and supporting papers 8 ; it is,

ORDERED that this motion by the defendants William Pyburn and BPR Performance LLC for an order pursuant to CPLR 3211 (a) (7) and (8) dismissing the complaint is granted to the extent of dismissing the second cause of action insofar as it is asserted against both of them and dismissing the first and third causes of action insofar as they are asserted against the defendant BPR Performance LLC; and it is further

ORDERED that the motion is otherwise denied.

On February 14, 2006, the plaintiff, a New York corporation, entered into an agreement with the defendant Kustom Engines & Performance Engineering, LLC ("Kustom"), a Florida limited liability corporation, to sell its marine engine manufacturing business to Kustom. The purchase price was $150,000, $140,000 of which was paid at the closing. The remaining $10,000 was to be paid by Kustom within one year after the closing, together with interest at the

rate of 6% per annum. In addition, Kustom agreed not to sell any engines or engine parts to the plaintiff's principal competitor, Outerlimits Offshore Powerboats ("Outerlimits"), for a period of five years after the date of the closing. The agreement was executed by the defendant Keith Eickert as a member of Kustom. Eickert also personally guaranteed Kustom's performance under the agreement. Kustom purportedly defaulted by failing to pay the remaining $10,000 due on the purchase price and by selling engines or engine parts to Outerlimits in violation of the restrictive covenant.

The agreement contains a forum-selection clause, which provides, in pertinent part, "The parties hereto explicitly agree that the Courts of the State of New York shall have sole and exclusive jurisdiction over any and all controversies arising directly or indirectly from this Agreement, and the parties hereby expressly consent to the jurisdiction of the Courts of the State of New York, including, but not limited to the Supreme Courts located within the Counties of Nassau and Suffolk, for any and all such controversies."

The plaintiff initially commenced this action against Kustom and Eickert to recover damages for breach of contract. By an order dated July 26, 2011, this court granted the plaintiff's motion for leave to amend the complaint to add as party defendants BPR Performance LLC ("BPR"), a Florida limited liability corporation, and William Pyburn, a Florida resident and a member of both Kustom and BPR.[1] The plaintiff subsequently amended the complaint to add causes of action to recover damages for fraud and fraudulent conveyance in violation of the Debtor & Creditor Law. Pyburn and BPR now move to dismiss the second amended verified complaint on the grounds that it fails to state a cause of action against them (CPLR 3211 [a] [7]) and that the court lacks personal jurisdiction over them (CPLR 3211 [a] [8]).

In support of the branch of their motion which is to dismiss pursuant to CPLR 3211 (a) (8), Pyburn and BPR submit competent evidence that they are a Florida resident and Florida limited liability corporation, respectively, and that they transact no business in New York. In opposition, the plaintiff contends that the court has personal jurisdiction over Pyburn and BPR because the agreement that is the subject of this action was executed in New York, because the alleged fraud took place in New York, and because the agreement contains a forum-selection clause naming New York as the chosen forum. The plaintiff also contends that Eickert was Pyburn's agent and co-conspirator, that Pyburn was in control of Kustom, and that he used Eickert to execute the agreement so that he would not be bound by the restrictive covenant barring the sale of engines to Outerlimits for a period of five years.

To successfully oppose a pre-answer motion to dismiss a complaint pursuant to CPLR 3211 (a) (8), the plaintiff need only make a prima facie showing that personal jurisdiction

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[1]The order also granted the plaintiff leave to add Kustom Engines, LLC, as a party defendant and granted the plaintiff's motion for an order of default against the defendant Kustom Engines & Performance Engineering, LLC.

exists (**Bill-Jay Mach. Tool Corp. v Koster Indus., Inc.**, 29 AD3d 504, 505). Pursuant to CPLR 302 (a) (1), personal jurisdiction may be obtained over nondomiciliaries for tort and contract claims arising from a defendant's transaction of business in New York either in person or through an agent (**Kreutter v McFadden Oil Corp.**, 71 NY2d 460, 467). CPLR 302 (a) (1) is a single-act statute, and proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, as long as there is a substantial relationship between the transaction and the claim asserted (**Id.**).

To sustain its burden, the plaintiff must establish that Eickert engaged in purposeful activities in New York for the benefit of Pyburn and BPR and that they exercised sufficient control over Eickert to make him their agent (**Polansky v Gelrod**, 20 AD3d 663, 664). The agreement that is the subject of this action was executed in New York by Eickert personally and as a member of Kustom. The plaintiff alleges that Eickert testified at his deposition that Pyburn, who is also a member of Kustom, was the one in total control of the business, that he owned the machinery, sold the engines, paid Eickert a salary, and transferred the business and equipment for no value to other businesses that he owned. The moving defendants do not dispute these allegations.

On a motion to dismiss pursuant to CPLR 3211 (a) (8), the facts alleged in the complaint and affidavits in opposition are deemed true and construed in the light most favorable to the plaintiff. Moreover, all doubts are resolved in favor of the plaintiff (*see*, **Weitz v Weitz**, 85 AD3d 1153, 1154). Applying these principles to this case, the court finds that the plaintiff has established, prima facie, that personal jurisdiction exists over the defendant Pyburn. The plaintiff, however, has failed to establish personal jurisdiction over the defendant BPR. As the moving defendants correctly point out, the complaint contains no allegations against BPR, and the fact that Pyburn is a member of BPR, without more, is insufficient to sustain jursidiction over BPR. Moreover, the plaintiff has failed to establish that BPR, which is not a signatory to the agreement between the plaintiff and Kustom, is so closely related to Kustom that enforcement of the forum-selection clause against it is foreseeable (*see*, **Hluch v Windham Operating Corp.**, 85 AD3d 861, 862-863). Accordingly, the complaint is dismissed insofar as it is asserted against the defendant BPR.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the sole criterion is whether the pleading states a cause of action and if, from its four corners, the factual allegations, taken together, manifest any cause of action cognizable at law (**Kopelowitz & Co., Inc. v Mann**, 83 AD3d 793, 796). Liberally construing the complaint, accepting the alleged facts as true, and giving the plaintiff the benefit of every possible favorable inference (**Id.**), the court finds that the plaintiff has sufficiently pleaded causes of action for breach of contract and fraudulent conveyance against Pyburn. Accordingly, the court declines to dismiss the first and third causes of action insofar as they are asserted against Pyburn.

The second cause of action for fraud alleges that Eickert conspired with Pyburn to

conceal Pyburn's involvement in the transaction so that Pyburn would not be bound by the restrictive covenant and would be free to sell Kustom engines to Outerlimits.

A cause of action for fraud requires allegations that the defendant made material representations of existing fact that were false and known by the defendant to be false when made for the purpose of inducing the plaintiff's reliance, justifiable reliance by the plaintiff, and damages (**Triple Z Postal Services, Inc. v United Parcel Service, Inc.**, 13 Misc 3d 1241[A] at *14). Fraudulent concealment requires, in addition to the foregoing elements, an allegation that the defendant had a duty to disclose material information and that it failed to do so (**P.T. Bank Central Asia v ABN Amro Bank, N.V.** 301 AD2d 373, 376). In the absence of a confidential or fiduciary relationship, there is no duty to disclose (**Triple Z Postal Services, Inc.**, *supra*). An arm's length business relationship does not give rise to a confidential or fiduciary relationship (**SNS Bank, N.V. v Citibank, N.A.**, 7 AD3d 352, 355). However, a duty to disclose has sometimes been found to arise when one party has superior knowledge that is not available to both parties. The context in which such a duty arises invariably involves direct negotiations between the parties to a business transaction (**Triple Z Postal Services, Inc.**, *supra* [and cases cited therein]).

Here, the parties were engaged in an arm's length business transaction. Thus, they did not have a fiduciary or confidential relationship. Moreover, the plaintiff does not allege that it was involved in any direct negotiations with Pyburn. Rather, the plaintiff alleges that it dealt with Eickert, who concealed Pyburn's involvement. While the plaintiff may have a cause of action against Eickert and/or Kustom for fraudulent concealment, the plaintiff has failed to establish that Pyburn had a duty to disclose his ownership interest in Kustom to the plaintiff. Moreover, a party cannot claim reliance when he or she could have discovered the truth with due diligence (**Purchase Partners II, LLC v Max Capital Management Corp.**, 19 Misc 3d 1123[A] at *6 [and cases cited therein]). The plaintiff alleges that, prior to February 2006, Pyburn expressed a desire to acquire the plaintiff's custom engine-building business. Thus, contrary to the plaintiff's contentions, the plaintiff was aware of Pyburn's involvement in the transaction or could have discovered it through the exercise of due diligence. The court finds that, under these circumstances, the complaint fails to state a cause of action against Pyburn for fraud. Accordingly, the second cause of action is dismissed insofar as it is asserted against Pyburn.

HON. ELIZABETH HAZLITT EMERSON

Dated: September 4, 2012

J.S.C.