

Fernie v Wincrest Capital Ltd.
2019 NY Slip Op 30510(U)
February 28, 2019
Supreme Court, New York County
Docket Number: 653282/2018
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 61 IAS MOTION

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REBECCA FERNIE,	INDEX NO.	<u>653282/2018</u>
Plaintiff,	MOTION DATE	<u>02/21/19</u>
- v -	MOTION SEQ. NO.	<u>001 & 002</u>
WINCREST CAPITAL LTD., BARBARA BERNARD, JOANNE BERNARD, FRANCIS CROTHERS, PRESS MANAGEMENT LLC, and HEDGEPORT ASSOCIATES, LLC		
Defendants.		

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 41, 43, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 81, 84, 85, 86, 87, 88, 89, 90, 91, 93

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 002) 35, 36, 37, 38, 39, 40, 44, 71, 82, 92

were read on this motion to/for DISMISSAL

HON. BARRY R. OSTRAGER:

Currently pending before the Court is Defendants' Wincrest Capital Ltd. ("Wincrest"), Barbara Ann Bernard ("BAB"), Joanne Marie Bernard ("JMB"), and Francis Joseph Crothers ("FCJ") (together, the "Wincrest Defendants") motion to dismiss Plaintiff Rebecca Fernie's ("Fernie") complaint for lack of personal jurisdiction and for *forum non conveniens*. Defendant HedgePort Associates, LLC ("HedgePort") moves separately to dismiss the complaint on the same grounds. Defendant Press Management LLC ("Press Management") joined the motions only on the basis of *forum non conveniens*. For the reasons stated below, the motions to dismiss for *forum non conveniens* are granted.

Background

The complaint alleges that Plaintiff Fernie and Defendant BAB worked together for several years in the Bahamas at non-party Holowesko Partners Ltd. (“Holowesko”), a wealth management firm. Fernie alleges that BAB solicited her to leave Holowesko and partner with BAB in a new company intending to manage the wealth of high net worth families, beginning with BAB’s own family (the “Crothers Family”).¹ BAB allegedly represented and agreed that in return for Fernie leaving Holowesko and joining BAB in the new company, Fernie and BAB would be equal equity partners and would co-manage the company equally. BAB further represented to Fernie that the Crothers Family would provide \$60 million in investment funds for the new company on day one and that those monies would be co-managed by Fernie and BAB and equally share the profits from managing the new fund.

On May 1, 2015, Fernie, purportedly in reliance on BAB’s representations, left Holowesko and joined BAB in forming the new company. On May 20, 2015, Fernie and BAB formed Defendant Wincrest under the laws of the Bahamas as an investment and asset management firm. Wincrest was incorporated with Fernie and BAB as two equal 50% shareholders of the company. Fernie was employed as the COO and BAB as the CEO. Each received an annual salary of \$250,000.

Despite BAB’s alleged representations to Fernie regarding an initial \$60 million investment, the Crothers Family failed to make such an investment in Wincrest when the company incorporated. Nevertheless, Fernie and BAB purportedly used their own personal funds to develop networking arrangements and engage with other potential investors.

¹ The Crothers Family includes Defendants JMB and FJC.

By January 2016, the Crothers Family and their controlled entities allegedly invested \$20 million. During 2016, BAB purportedly continued to assure Fernie that the promised \$60 million investment would be made in full by the Crothers Family and that Fernie and BAB would continue to equally share in managing and profiting from that investment.

In September 2016, BAB allegedly demanded that Fernie agree to diminish her 50% stake in Wincrest to 19%, such that BAB would hold a 51% stake and the Crothers Family would gain a 30% stake, in exchange for the Crothers Family providing the full \$60 million investment to Wincrest. Fernie refused to agree to BAB's demand but did apparently agree to a resolution appointing JMB and FJC as directors of Wincrest.

Throughout late 2016 and early 2017, BAB allegedly pressed Fernie to agree to reduce her ownership interest in Wincrest. Fernie declined each such request.

In March 2017, purportedly without consultation with Fernie, BAB, JMB, and FJC signed a Strategic Agreement whereby the Crothers Family would have a 10% revenue share in Wincrest. On April 28, 2017, BAB, JMB, and FJC allegedly signed a resolution, passed without notice to Fernie, removing Fernie as director of Wincrest. On the same day, BAB, as Wincrest's CEO, allegedly removed Fernie as COO and terminated her employment.

Fernie also alleges that the Defendants Press Management and HedgePort substantially assisted the Wincrest Defendants in improperly removing Fernie from the company.

On December 20, 2016, BAB, without Fernie's notice or approval, allegedly engaged Press Management to revise Wincrest's management and business structure. Press Management purportedly agreed with the Wincrest Defendants to exclude Fernie from Wincrest and acted in

furtherance of that agreement by providing advice and consultant services to the Wincrest Defendants.

On March 15, 2017, BAB, without Fernie's notice or approval, allegedly engaged HedgePort to provide executive level outsourced services for Wincrest, and effectively act as CFO and COO of Wincrest, by providing ongoing accounting and operations services to the company. HedgePort also purportedly agreed with the Wincrest Defendants to exclude Fernie from Wincrest and acted in furtherance of that agreement by providing advice and consultant services to the Wincrest Defendants.

Thus, the thrust of Plaintiff's complaint is that BAB, after inducing Fernie to work for Wincrest by misrepresenting the opportunity to co-manage 60 million in assets, eventually conspired with the Wincrest Defendants, Press Management, and HedgePort to improperly exclude Fernie from the company BAB induced Fernie to join.

Defendants all move to dismiss the action for *forum non conveniens*.² The Wincrest Defendants and HedgePort also move to dismiss for lack of personal jurisdiction. Press Management does not dispute that it is subject to the general jurisdiction of this Court.

² There is conflicting authority regarding whether this Court must first decide jurisdictional issues before deciding the *forum non conveniens* issue. The United States Supreme Court has, in this circumstance, ignored jurisdictional issues and dismissed an action on *forum non conveniens* grounds. See *Sinochem International Co., Ltd. v. Malaysia International Shipping Co.*, 549 U.S. 422, 436 (2007) (holding that a court need not decide jurisdictional issues if it determines that a foreign tribunal is a more suitable forum for the case). The First Department has issued conflicting decisions on whether jurisdictional issues must be addressed first. Compare *Wyser-Pratte Management co., Inc. v. Babcock Borsig AG*, 23 A.D.3d 269, 269 (1st Dep't 2005) ("The motion court incorrectly dismissed the complaint as against defendants TUI and PwC on *forum non conveniens* grounds without first adjudicating their jurisdictional defenses."), with *Payne v. Jumeirah Hospitality and Leisure (USA), Inc.*, 83 A.D.3d 518, 519 (1st Dep't 2011) (having affirmed *forum non conveniens* dismissal, "we need not consider whether the court should have dismissed the action for lack of personal jurisdiction").

The Court believes that this action should be dismissed for *forum non conveniens*. However, out of an abundance of caution, this Court will also analyze the jurisdictional issues which, ultimately, provide separate grounds for dismissal.

Forum Non Conveniens

“Ordinarily, nonresidents are permitted to enter New York courts to litigate their disputes as a matter of comity.” *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 478 (1984).

However, “[t]he common-law doctrine of forum non conveniens ... permits a court to stay or dismiss such actions where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere.” *Id.* at 478-79. “The burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation and the court, after considering and balancing the various competing factors, must determine in the exercise of its sound discretion whether to retain jurisdiction or not.” *Id.* at 479. “Among the factors to be considered are 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. The court may also consider that both parties to the action are nonresidents and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction.”

First, the potential hardship on the various Defendants weighs in favor of dismissal. The Directors are all long-time permanent residents of the Bahamas. FJC affirmed in a written affirmation accompanying the motion that travel to New York to defend this lawsuit would impose a personal hardship on him due to a serious medical condition for which he is currently being treated. (Francis Joseph Crothers Aff. [NYSCEF Doc. No. 34]). Thus, there is potential hardship on the Wincrest Defendants in forcing them to litigate this action in New York.

Second, the Bahamas is an available alternative forum in which Plaintiff may bring suit. Plaintiff and the Directors are all domiciled in the Bahamas. Defendant Wincrest is a Bahamian

corporation with its principal place of business in the Bahamas. The nexus of the alleged tortious conduct occurred in the Bahamas. Further, Defendants Press Management and HedgePort have expressly consented to be sued in the Bahamas. Thus, the availability of the Bahamas as an alternative forum favors dismissal.³

Third, both Plaintiff and the main Defendants in this action are residents of the Bahamas. Five of the seven parties in the action are domiciled in the Bahamas. The claims against the Wincrest Defendants are undoubtedly at the center of this lawsuit, as opposed to the more nominal conspiracy and aiding and abetting causes of action levied against Press Management and HedgePort. Thus, the Bahamian residency of the majority of the parties weighs in favor of dismissal on forum non conveniens grounds.

Fourth, litigation in New York would impose at least a minor burden on the Court due to the applicability of Bahamian law. “The applicability of foreign law is an important consideration in determining a forum non conveniens motion and weighs in favor of dismissal.” *Shin-Etsu Chem. Co., Ltd. v. ICICI Bank Ltd.*, 9 A.D.3d 171, 178 (1st Dep’t 2004).

³ Indeed, certain of Plaintiff’s claims are not even tangentially related to New York by way of Press Management or HedgePort, and thus, the Bahamas is the only forum in which all the Plaintiff’s claims could be adjudicated.

For instance, Plaintiff’s fifth cause of action alleges that she was fraudulently induced to leave her job at Holowesko, a Bahamian company, and join BAB at Wincrest, another Bahamian company, based on BAB’s misrepresentations regarding an initial \$60 million investment that never came to fruition.

While this Court does not believe it has personal jurisdiction with respect to any of the claims asserted against any of the Defendants (other than Press), it seems beyond doubt that the Court does not have personal jurisdiction over BAB with respect to a claim that relates exclusively to conduct that occurred between BAB and Fernie in the Bahamas and that predates any involvement of Press Management and HedgePort.

Thus, even were the Court to find that New York is a convenient forum and that personal jurisdiction exists with respect to certain claims, the Court could not possibly have jurisdiction over the central claims in this case, which can only be adjudicated in the Bahamas.

Judicial economy militates in favor of Plaintiff litigating in a forum in which *all* her claims can be heard together.

Finally, this is a case primarily between Bahamian parties involving a dispute over the internal affairs of a Bahamian corporation. This Court, in the interest of comity, defers to the Bahamian interest in resolving that country's own corporate governance issues.

For these reasons, the Court grants Defendants' motions to dismiss for *forum non conveniens*.

General Jurisdiction

Even if this Court were to determine that New York is an appropriate forum to litigate this Bahamian dispute, the Court lacks jurisdiction over the Wincrest Defendants and HedgePort regarding the claims asserted herein.

First, it does not appear—and Plaintiff does not otherwise contend in opposition—that there is a basis for general jurisdiction over any of the Wincrest Defendants.

Defendant Wincrest is incorporated and maintains its principal place of business in the Bahamas and is thus only subject to general jurisdiction in the Bahamas. *See Daimler AG v. Bauman*, 571 U.S. 117, 139 (2014); *see also Aybar v. Aybar*, 2019 WL 288307, at *4 (2d Dep't 2019) (“The [*Daimler*] Court instructed that, with respect to corporations, the paradigm bases for general jurisdiction are the place of incorporation and principal place of business.”).

HedgePort, similarly, is a Delaware limited liability company with its principal place of business in California. Even if HedgePort maintained a small office in New York, as Plaintiff asserts, that alone would be insufficient for general jurisdiction to lie. *See B&M Kingstone, LLC v. Mega Intl. Commercial Bank Co., Ltd.*, 131 A.D.3d 259, 264 (1st Dep't 2015) (applying *Daimler* in finding no general jurisdiction over bank with branch in New York).

This Court also lacks general jurisdiction over BAB, JMB, and FJC (together, the “Directors”). “New York courts may not exercise general jurisdiction against a defendant under the United States Constitution or under CPLR 301 unless the defendant is domiciled in the state or in an exceptional case where an individual’s contacts with a forum are so extensive as to support general jurisdiction notwithstanding domicile elsewhere.” *IMAX Corp. v. Essel Group*, 154 A.D.3d 464, 465-66 (1st Dep’t 2017) (internal citations and quotations omitted).

Here, the Directors are all domiciled in the Bahamas. BAB’s New York contacts are limited to having previously leased an apartment in New York no later than May 2016 and occasional travel to New York for business conferences and leisure. (Barbara Ann Bernard Aff. [NYSCEF Doc. No. 26]). JMB and FJC maintain no property in New York and do not travel to New York regularly. (Joanne Marie Bernard & Francis Joseph Crothers Affs. [NYSCEF Doc. Nos. 33-34]). Therefore, this Court does not have general jurisdiction over the Directors because they are all domiciled in the Bahamas and do not have extensive contacts with New York.

Specific Jurisdiction

Personal jurisdiction exists over a non-domiciliary defendant who itself, or through acts of its agent, “transacts any business within the state or contracts anywhere to supply goods or services in the state.” CPLR § 302(a)(1). “To establish personal jurisdiction under section 302(a)(1), two requirements must be met: (1) The defendant must have transacted business within the state; and (2) the claim asserted must arise from the business activity.” *Eades v. Kennedy, PC Law Offices*, 799 F.3d 161, 168 (2d Cir. 2015).

Plaintiff alleges that BAB, acting on behalf of Wincrest, sought out Press Management, a New York company, and executed an agreement for Press Management to provide Wincrest with

consulting services, which included a purported plan to expropriate Fernie's shares and remove her from Wincrest. Thus, the jurisdictional hook that Plaintiff hangs her hat on is New York-based Press Management's alleged tortious conduct in conspiring with and assisting the Wincrest Defendants in removing Fernie from the company. While it is uncontested that Press Management is subject to this Court's jurisdiction because it maintains its principal place of business in New York, the Court must determine whether the Wincrest Defendants' transactions with Press Management in New York form a sufficient basis for jurisdiction to lie.

Here, Wincrest contracted with Press Management, but did so from out of state, to obtain assistance with its business operations in the Bahamas. It is not alleged that the agreement with Press Management was negotiated or executed in New York. Further, the services provided by Press Management consisted of consulting work that was provided to a business and individuals operating out of and domiciled in the Bahamas. Thus, the services were ultimately rendered in the Bahamas and not New York.

Plaintiff also alleges that Wincrest executed a Services Agreement with Defendant HedgePort for HedgePort to provide consulting services to Wincrest. It is alleged that HedgePort, a Delaware corporation with its principal place of business in California, acted out of a New York office in providing consulting services to Wincrest in the Bahamas.

However, "New York does not have personal jurisdiction over defendants pursuant to CPLR 302(a)(1), as they did not avail themselves of the privilege of conducting activities within this State, thus invoking the benefits and protections of its laws." *Ripplewood Advisors, LLC v. Callidus Capital SIA*, 151 A.D.3d 611, 612 (1st Dep't 2017); see *Barrett v. Tema Development (1988), Inc.*, 463 F. Supp. 2d 423, 431 (S.D.N.Y. Nov. 15, 2006) (holding that retention of New

York law firm to facilitate business activities in Massachusetts did not ground CPLR 302(a)(1) jurisdiction in New York).

Wincrest, a Bahamian corporation, merely contracted with Press Management, a New York company, to receive consulting services to help operate Wincrest's Bahamian business operations. Similarly, Wincrest contracted with HedgePort, a non-New York domiciliary, for HedgePort to provide consulting services to Wincrest in the Bahamas. Such transactions are insufficient for jurisdiction to lie pursuant to CPLR § 302(a)(1) because the services were ultimately rendered in the Bahamas.

Plaintiff points to the same conduct—the consulting services provided by Press Management and HedgePort—in asserting that the Wincrest Defendants and HedgePort committed tortious acts within New York such that jurisdiction may lie.

Personal jurisdiction exists over a non-domiciliary defendant who, in person or through an agent, “commits a tortious act within the state.” CPLR § 302(a)(2).

Here, Plaintiff has not alleged a tortious act by any of the Wincrest Defendants that occurred in New York. Plaintiff has merely asserted, in conclusory fashion, a vague, tortious conspiracy involving a single New York company that provided consulting services to Bahamian defendants in the Bahamas. Whatever injury Plaintiff alleges necessarily must have been incurred in the Bahamas where Plaintiff lives and works. The nexus of the alleged tortious acts is the Bahamas where the Wincrest Defendants allegedly breached their fiduciary duties in pushing Plaintiff out of the Bahamian company.

Thus, even if the Court concluded that New York is a convenient forum to litigate this dispute, which it is not, the Court would lack jurisdiction over the Wincrest Defendants and HedgePort regarding the claims asserted by Plaintiff.

Accordingly, it is hereby

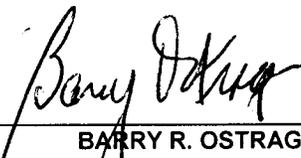
ORDERED that the motions of Defendants to dismiss this action on the ground that New York is an inconvenient forum are granted on condition that Defendants Press Management and HedgePort consent to jurisdiction in the Bahamas; and it is further

ORDERED that, within 30 days from service of a copy of this order with notice of entry, Defendants shall file proof of compliance with the above condition with the Clerk of the Part 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 Plaintiff; 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* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/suptmanh); and it is further

ORDERED that, upon the timely filing of the foregoing, the Clerk of the Court shall enter judgment dismissing the action.

2/28/2019
DATE


BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE