SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. Justice

PART 2

Datwani

-v-

Datwani.

INDEX NO. 112937/11

MOTION DATE

MOTION SEQ. NO. 002

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). ____

Answering Affidavits — Exhibits ____ No(s). ____

Replying Affidavits ____ No(s). ____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying decision

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

FOR THE FOLLOWING REASON(S): ____

Dated: 12/18/13

LOUIS B. YORK J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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JANAK DATWANI,

Plaintiff,

Index No. 112937/2011

-against-

KISHIN DATWANI,

Defendant.

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LOUIS B. YORK, J.:

CNA Exports Private Limited ("CNA") is an Indian company incorporated in 1975. Though it has ceased its business activities, it still holds valuable real estate in India. Members of the Datwani family are the primary owners of CNA.

Plaintiff Janak Datwani, who lives in Paris, and defendant Kishin Datwani, who resides in Manhattan, are brothers. In 1992, and since 1975, Janak held 13.33%, or 1500 shares, of CNA's stock, and Kishin owned 13.33%, or 1500 shares – which, at the time, gave both brothers an equal financial interest in the company and an equal percentage ownership. Janak claims that a 1992 letter agreement which he and his brother allegedly signed acknowledges that in return for $6000,[1] Janak would receive Kishin's shares of stock. Kishin argues that the letter is a forgery, and that he never entered into the alleged agreement. He also states that the nearly 20-year delay in acting on the alleged agreement constitutes laches, so that even if there had been an agreement it would not be enforceable.

[1] In this case and others, the parties refer to United States dollars when they describe the alleged transactions.

Janak claims that both this transaction and his agreement with Kishin transferred the voting, decision-making, and financial rights in the shares to him. He points to the 1992 letter as support for his allegation that a contract exists, and he states that the delay in transfer of the stock at issue was at Kishin's request, as Kishin did not wish to transfer the stock to his brother during his brother's feud with their father.

Regardless, the parties did not seem to have a rupture until around November 2010 – when, according to Kishin, Janak started making vague and allegedly false references to the purported 1992 letter agreement. Kishin vigorously denies that he entered into such an agreement with Janak, and he denies Janak's statement that he received $6,000 – or any – consideration in exchange for any stock. Shortly thereafter, he states, both Janak and Anand claimed ownership of Kishin's shares. Kishin further states that an attorney in the United States served him with a legal notice demanding that he comply with the alleged 1992 agreement, and that when he failed to do so, Janak filed the current lawsuit. In the present action, Janak alleges breach of the 1992 correspondence, which he claims is a binding contract, and he seeks specific performance by his brother and a declaration that the agreement is enforceable. Janak states that Kishin intitiated their dispute by stating that he was contemplating selling his interest in the company, and that the shares Kishin planned to sell belonged to Janak. He simply seeks to protect his own property from an unlawful transfer.

In a prior motion, Janak moved for a preliminary injunction preventing Kishin from selling the shares that allegedly belonged to him. Kishin opposed the motion and also indicated that he had no intention of selling the shares in controversy. Considering the controversy and the parallel case in India, this Court instead stayed this action pending the resolution of the lawsuit in India. Earlier this year, the First Department modified the order. *Datwani v. Datwani*, 102

A.D.3d 616, 959 N.Y.S.2d 153 (1st Dept. 2013). The First Department determined that 1) the court should not have stayed the action, because neither party had requested the stay and the India litigations would not resolve the issues here, *id.* at 616, 959 N.Y.S.2d at 154; 2) this Court correctly granted a preliminary injunction, partly because the letter agreement included all the terms necessary to comprise a binding contract, *id.*; 3) laches does not apply here, where the defendant has suffered no prejudice from the delay and where the CNA board, which must approve the transaction, may provide adequate protections, *id.* at 616-17, 959 N.Y.S.2d at 154; 4) discovery is required to determine whether the statute of limitations has expired; and 5) this Court should have provided for an undertaking, *id.* at 617, 959 N.Y.S.2d at 154 (citing CPLR § 6312(c)).

Following the issuance of the First Department order, Kishin brought the instant motion. He seeks 1) an order of dismissal of the complaint based on *forum non conveniens* or, alternatively 2) an order that extends his time to answer the complaint and requires an undertaking pursuant to CPLR § 6313. Janak opposes the motion except to the extent that it seeks an undertaking.

Finally by way of background, it's important to note that in response to Janak's lawsuit, Kishin commenced his own lawsuit in India. There, Kishin seeks declarations that the 1992 correspondence is not valid and is not a binding and legally enforceable contract, and that he continues to own the 1500 shares in dispute giving him a 13.33% share in the company. He seeks this relief from his brother Anand as well. Kishin claims that while he lived outside of India, Janak and Anand reorganized the company and replaced members of the Board of Directors without his knowledge. Kishin also claims that the ongoing lawsuits in India involve disputes over the correct allocation of shares of – and therefore control of – CNA; this case, with

its similar subject matter, he states, should be heard along with the cases in India. He argues that India's law governs interpretation of the alleged agreement. He contends that relevant evidence is located in India, and that family members who live in India will be deposed and called as trial witnesses. He also claims that until recently Janak acknowledged him as a shareholder; in 2007 in an effort to persuade Kishin to sign power of attorney to him, Janak told Kishin that Anand had transferred Kishin's shares to himself, likely by forgery, in 1998. Kishin contends that Janak repeatedly stated he wanted power of attorney in order to protect Kishin's shares of and interest in the company, thus implicitly acknowledging that the shares belonged to Kishin long after the alleged 1992 agreement. These representations allegedly continued into 2008, often by email.

Analysis

Kishin seeks an order of dismissal of this action on the basis of *forum non conveniens*. Under CPLR § 327(a), "[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just." This is true even where, as here, a court has jurisdiction over the case. *Boyle v. Starwood Hotels & Resorts Worldwide, Inc.*, 110 A.D.3d 938, – , 973 N.Y.S.2d 728, 729-30 (2nd Dept. 2013). The moving party bears the burden of demonstrating that relevant factors exist that militate against keeping the lawsuit in New York. *Mashreqbank PSC v. Ahmed Hamad Al Gosaibi & Bros. Co.*, 101 A.D.3d 1, 8, 951 N.Y.S.2d 124, 128 (1st Dept. 2012). Unless the movant makes a strong showing, the plaintiff's choice of forum will be honored. *OrthoTec, LLC v. Healthpoint Capital, LLC*, 84 A.D.3d 702, 702-03, 924 N.Y.S.2d 78, 80 (1st Dept. 2011).

The court has broad discretion in considering a motion to dismiss based on *forum non conveniens*. *Shin Etsu Chemical Co., Ltd. v. 3033 ICICI Bank Ltd.*, 9 A.D.3d 171, 175, 777 N.Y.S.2d 69, 73 (1st Dept. 2004); *Adcock v. Rapid-American Corp.*, 239 A.D.2d 303, 304, 658 N.Y.S.2d 858, 858 (1st Dept. 1997). Its determination will not be overturned unless it fails to consider the relevant factors. *Salzstein v. Salzstein*, 70 A.D.3d 806, 807, 894 N.Y.S.2d 510, 512 (2nd Dept. 2010); *see May v. U.S. HIFU, LLC*, 98 A.D.3d 1004, 1007, 951 N.Y.S.2d 163, 166 (1st Dept. 2012)(where trial court considered appropriate factors, appellate court affirmed the order). These include: 1) the existence of another available forum, 2) the existence or lack of a choice-of-law provision in the contract, 3) the question of which law will be applied, 4) the location of witnesses and evidence, 5) the question of whether the issues are inextricably intertwined with another action, 6) the location where the transaction in dispute originated 7) the questions of whether either party will suffer great prejudice as the result of an adverse ruling and whether the witnesses will be inconvenienced if the case remains where it is, and 8) the burden on the New York courts. *See Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 478-79, 478 N.Y.S.2d 597, 599-600 (1984). The doctrine is flexible, enabling a Court to select and balance the relevant factors above in order to reach a just determination. *See Gozzo v. First American Title Ins. Co.*, 75 A.D.3d 953, 954, 905 N.Y.S.2d 702, 704 (3rd Dept. 2010).

Kishin argues that this case places an undue burden on the New York courts because a New York business is not involved, his own residence in New York allegedly is the only connection between New York and the case, and this case is an especially complicated one. The Court does not find this argument persuasive. For one thing, according to the complaint, Kishin also signed the letter agreement which is the subject of this lawsuit in New York. Though Kishin challenges this contention, he cannot ignore it. Therefore, the nexus to New York still

exists. For another, the courts of this State often handle complex cases. It is insufficient to dismiss cases on this basis, or on the basis that the courts are overburdened. Kishin's argument that complex litigation which is not related to New York should be dismissed, *see Phat Tan Nguyen v. Bank Indosuez*, 19 A.D.3d 292, 797 N.Y.S.2d 89 (1st Dept. 2005)("Nguyen"), is not persuasive because, as stated, the complaint characterizes this dispute as one involving a contract that Kishin signed in New York.[2] It also is distinguishable from *Nguyen* as the lawsuit involved a challenge in New York to a decision made by a bank in France which affected plaintiffs' businesses in Saigon. In addition, in that case New York law was inapplicable. *Id.* at 295, 797 N.Y.S.2d at –.

As the First Department noted, the contract dispute in this case could be litigated in New York without inconvenience. The agreement allegedly was signed here, Kishin – the party who seeks dismissal of the case – lives here, and according to Janak the brothers attempted to resolve the dispute here on several occasions before he commenced this action. As stated earlier, a court will honor a plaintiff's forum selection unless a defendant makes an ample showing that the case should not be tried in this forum because of the extremity of the inconvenience.

Nonetheless, after careful consideration the Court concludes that dismissal on the ground of *forum non conveniens* is appropriate. As the First Department stated, the issues involved in this case are not identical to the issues in the India action. However, this rests on plaintiff's characterization of the lawsuit as one for breach of contract. The Court has read both the India and the New York complaints, and notes the following similarities: both seek to determine whether Kishin or Janak own the shares in question. If this were the end of the analysis, the

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[2]Janak also states that the two brothers met in order to resolve this dispute, and that all meetings were in New York.

Court would deny defendant's motion. However, the India action is more comprehensive, as it seeks a ruling as to whether Kishin, Janak or Anand own the shares. As stated earlier, Anand claims that Kishin signed an agreement giving him ownership and control of the shares. A ruling in India that Anand owns the shares would be inconsistent with any ruling by this Court. In addition, if the Court retained the case it would allow Kishin time to answer, and his answer, including any affirmative defenses and counterclaims he might bring, may well intertwine the two cases more inextricably.

The First Department concluded that there was a likelihood that plaintiff would succeed on the merits, sufficient to justify the issuance of a preliminary injunction. However, that decision is not determinative of this Court's decision concerning whether *forum non conveniens* should apply, particularly as *forum non conveniens* was not involved in the earlier motion or the subsequent decision.

However, the dispute does not end with the contract. The Court already has mentioned that another brother, Anand Datwali, has claimed the stock is his, and both Kishin and Janak have challenged Anand's claim as fraudulent. In fact, Kishin's lawsuit includes challenges to Janak and Kishin's claims of ownership of his stock and challenges both sets of papers as forgeries. The India Court will determine whether Janak, Anand or Kishin owns the shares. Either Anand or Janak's arguments must be rejected in the India action, as both cannot possess the legal right to 100% of Kishin's interest in the company. The possibility of inconsistent rulings is evident. Moreover, Anand is not a party to this lawsuit, so not all of the claims of ownership can be addressed in this action.

The First Department did find that this case was most likely a straightforward breach of contract case. In support of his claim, however, Janak now annexes a letter Kishin purportedly

signed on February 1, 2006. This document, which Kishin apparently does not challenge, gives Janak proxy rights with respect to Kishin's shares. However, according to Janak's affidavit, his agreement with Kishin in 1993 gave him full voting rights. The only thing Janak purportedly delayed was the actual transfer of the shares. This raises an issue of fact as to the authenticity of the agreement, weakening the argument that the case can be litigated here.

In addition to the above, the dispute over ownership of the stock at hand is part of a widespread fight over power and ownership of the stock in general. It was only in further research that the Court discovered the miasma of litigations and realized they are either directly or indirectly intertwined. There are numerous other cases in India relating to the ownership of various other shares. One concerns the legitimacy of Anand's claim that he owns Kishin's stock; Janak is one of those challenging Anand's claim. Others involve challenges to Anand's claim that he is majority shareholder.[3] In addition, Janak points to a transfer between two other parties, of 2500 shares for $6000, to show that transactions such as the one at issue here were commonplace and fair. However, that transfer also was challenged as fraudulent in a lawsuit in India. It makes much more sense for the dispute before this Court to be litigated in India where a global resolution of the CNA ownership litigations is possible, perhaps through consolidation or joinder of the remaining active cases.

Also because of the plethora of other related cases it already has considered, India has a substantial interest in adjudicating this lawsuit. *See Elmaliach v. Bank of China Ltd.*, 110 A.D.3d 192, 209, 971 N.Y.S.2d 504, 508 (1st Dept. 2013)(denying application where neither

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[3]In one decision the India court stated that it was undisputed that in 1998 Kishin, among others, owned shares of CNA but that he signed them over to his mother, who in turn signed them over to Anand.

interest of justice or lack of nexus necessitated transfer). It is not clear whether, or how, corporate law will be involved as Kishin claims. If so, however, India's law will govern to the extent that substantive issues relating to the corporation are involved in the litigation. *Flame S.A. v. Worldlink Intern. (Holding) Ltd.*, 107 A.D.3d 436, 438, 967 N.Y.S.2d 328, 331 (1st Dept. 2013)(upholding *forum non conveniens* dismissal). Where the resolution of the dispute involves consideration of foreign laws, dismissal for *forum non conveniens* is a proper exercise of judicial discretion. *See FIM Bank v. Woori Finance Holdings Co. Ltd.*, 104 A.D.3d 602, 603, 962 N.Y.S.2d 114, 116 (1st Dept. 2013). This is especially true where, as here, the parties also have the ability to litigate the instant dispute in India.

The convenience of the parties and the locations of witnesses and evidence also militate in favor of the India lawsuit. Though Janak says his case only involves breach of contract and only seeks declaratory and injunctive relief, Kishin has made it clear that if this case is not dismissed he will allege fraud and forgery of his signature on the alleged contract in his answer.[4] In his motion papers, he has explained that he will seek the testimony of witnesses in India, where CNA is located and incorporated, about various transactions, Board meetings, and proxy agreements. Kishin claims their testimony will support his contention that Janak and the other owners of the company treated him as a 13.33% shareholder throughout the period in question and up to the time of this lawsuit. This also militates in favor of dismissal of the New York lawsuit. *Id.*

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[4] Kishin's motion requests that if this case is not dismissed he receive additional time to answer. Janak opposes this request. In the interest of fairness and judicial economy, and given the different characterizations of the parties' agreement regarding this matter, the Court would have granted this prong of his motion if it did not dismiss the case.

Conclusion

For the reasons above, it is

ORDERED and ADJUDGED that the motion is granted and the action is dismissed based on forum non conveniens.

The Court notes that it has considered all of the parties' remaining arguments although it has only discussed the more meritorious of the points they have raised.

Dated: Dec. 18, 2013

Enter:

LOUIS B. YORK, J.S.C.

LOUIS B. YORK
J.S.C.

UNFILED JUDGMENT
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