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

PRESENT: _____ J.S.C. Justice PART 45

Alexander Gilliland

-v-

Michael Chernoi

INDEX NO. 602335/09

MOTION DATE _____

MOTION SEQ. NO. 017

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion by defendant to dismiss the action on grounds of forum non conveniens is DENIED.

Dated: October 17, 2011

_____ J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

ALEXANDER GLIKLAD,	:	
	:	
Plaintiff,	:	Index No. 602335/09
	:	
-against-	:	DECISION AND ORDER
	:	
MICHAEL CHERNOI,	:	Sequence No. 017
	:	
Defendant.	:	

MELVIN L. SCHWEITZER, J.:

This matter involves a promissory note for $270 million executed in 2003 by a prominent Russian businessman. The note has not been paid and both parties in this litigation claim that they are entitled to the amount owed under the note. Plaintiff filed suit in this court in 2009. Defendant commenced a parallel suit in Israel in 2011. Defendant has filed this motion to dismiss on the grounds of *forum non conveniens*.

Background

In 2009, plaintiff Alexander Gliklad (Mr. Gliklad) filed a Motion for Summary Judgment in Lieu of Complaint pursuant to CPLR 3213 to enforce a $270 million promissory note (Note) signed by defendant Michael Chernoi (Mr. Chernoi) in 2003. It is uncontested that defendant's New York attorney prepared the Note. Plaintiff claims that the Note was consideration for his transferring all of his interest in the Russian coal company KuzbassRazrezUgol in which he held a 26.37% equity interest. Defendant replies to plaintiff's allegations with his own account of the facts. Mr. Chernoi claims that he mistakenly signed his name under the term "borrower" on the Note because he was drunk, indicating that he and Mr. Gliklad shared a meal with plentiful amounts of alcohol before signing the Note in Vienna.

Mr. Chernoi filed a counterclaim stating that in fact Mr. Gliklad owes *him* the $270 million for a loan that Mr. Chernoi made to Mr. Gliklad in 1997 or 1998 to finance the construction and development of a new railway system in Russia in conjunction with the Russian Ministry of Transportation. Allegedly, this loan was made by a company under Mr. Chernoi's control, Nash Investments Ltd., to two companies in which Mr. Gliklad had an interest, Vitapoint Ltd. and Otava. Mr. Gliklad has produced evidentiary support showing that the Vitapoint/Nash loan was repaid in full and was not the subject of the Note.

Mr. Gliklad had previously sought a declaratory judgment on the Note in Israel in May of 2005. At that time, Mr. Chernoi did not make any counterclaims and did not attempt to argue the merits of the case. The 2009 counterclaim in this court marks the first time that Mr. Chernoi alleged that, in fact, Mr. Gliklad owes *him* $270 million.

In 2011, after one and a half years of litigation in New York, Mr. Chernoi filed essentially the same lawsuit in Israel pertaining to the Note. The distinction between the two lawsuits is that, in Israel, Mr. Chernoi is only seeking equitable remedies whereas in the New York litigation he is seeking money damages as well. Both the parties and the court have expended substantial time and resources on this litigation. The parties have participated in numerous conferences, submitted correspondence to the court, filed several motions, taken depositions and otherwise actively engaged in discovery. This court has grown familiar with the issues involved in this dispute and has handed down three decisions, devoting its scarce resources to the resolution of the issues put before it.

Mr. Chernoi initiated proceedings in Israel while the case was pending in New York. He obtained a default judgment in Israel which was withdrawn by agreement of the parties on April 1, 2011. On May 23, 2011, this court issued a decision stating that Mr. Chernoi is subject

to personal jurisdiction in New York. This decision was grounded on Mr. Chernoi's moving here for summary judgment. The plaintiff then filed a motion for an anti-suit injunction barring defendant Mr. Chernoi's prosecuting the case in Israel. The court granted the motion.

Discussion

The common law doctrine of *forum non conveniens*, codified by CPLR 327 (a), "permits a court to stay or dismiss such actions where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere." *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478 (1984) (New York "courts are not required to add to their financial and administrative burdens by entertaining litigation which does not have any connection with this State."). "The doctrine is based upon the equitable principles of justice, fairness and convenience, and should be applied flexibly by the court, in its sound discretion, based upon the facts and circumstances of each particular case." *Phat Tan Nguyen v Banque Indosuez*, 19 AD3d 292, 294 (1st Dept 2005) (internal citations omitted). "If the balance of conveniences indicates that trial in the plaintiff's chosen forum would be unnecessarily burdensome for the defendant or the court, then dismissal is proper." *Foster Wheeler Iberia S.A. v Mapfre Empresas S.A.S.*, 15 Misc 3d 1112(A), (NY Sup Ct 2007) (unreported); *see also Globalvest Mgmt. Co. v Citibank, N.A.*, 7 Misc 3d 1023(A) (NY Sup Ct 2005) (unreported).

The factors considered by New York courts in resolving forum challenges include potential hardship to the defendant; residency of the parties; situs of the cause of action; location of documents and witnesses; availability of an alternative forum; and the burden on New York courts. *Pahlavi*, 62 NY2d at 479. Courts also consider whether the plaintiff has previously availed himself of a foreign court on a related matter, *Rosenberg v Stikeman Elliott, LLP*, 44 AD3d 840, 841, 843 NYS2d 433, 435 (2d Dept 2007). "No one factor is controlling," and the

absence of an alternate forum is not dispositive. *Pahlavi*, 62 NY2d at 479, 481. "The burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation[.]" *Id.* at 479.

As an initial matter, the court references a distinctive element in this case. The Note contains a provision with respect to which the court previously said "Although expert testimony has yet to be heard on this point, the court is of the opinion that the language of the clause is susceptible to the reasonable interpretation that it embodies both a forum selection clause and a choice of law clause." Mr. Chernoi contends the clause can only be interpreted as a choice of law clause. Mr. Gliklad posits that it is both. The court does not now resolve this issue but turns to an analysis of the New York *forum non conveniens* test as it applies to the facts of this case.

First, as noted above, in light of its extensive amount of work on this case, including the issuance of three decisions, supervision of discovery, hearing oral arguments and attending to numerous issues which required informal resolution in lieu of motion practice, the court has become thoroughly familiar with the facts and law which will have to be considered in connection with the ultimate resolution of liability on the Note. Put another way, the court is well past the mid-point of the learning curve. Given this set of circumstances, the court sees a lightened burden with respect to completion of the instant proceedings. Consequently, the court does not believe that in weighing the various factors in a *forum non conveniens* analysis a great deal of weight should be allotted to the burden on New York's limited judicial resources.

Second, although the court is of the view – and has previously opined in an unrelated matter – that the Israeli courts are well-equipped to handle complex commercial matters, this does not settle the question of whether Israel is the more suitable forum to hear this case at this juncture. Mr. Gliklad contends he cannot travel to Israel without jeopardizing his refugee status

in Canada, and the court held in a prior opinion that litigating in Israel would thus constitute undue hardship for him. Mr. Chernoi argues this hardship can be avoided by Mr. Gliklad testifying in an Israeli court by video link. In fact, Mr. Chernoi asserts he will stipulate to allow plaintiff to testify in such a fashion. Mr. Gliklad argues that while there is simple precedent for permitting a party to testify by video link in Israel, the courts do not favor it and, in fact, have denied use of a video link in cases similar to the one here. Taking these factors into account, the court is of the opinion that adjudicating this case in Israel will burden Mr. Gliklad and this will have to be weighed against the burden on Mr. Chernoi of proceeding in New York.

Third, the case is essentially about the validity of a Note which was negotiated and prepared in New York and executed in Austria. However, the stories behind the Note play out principally in Russia. Numerous witnesses in this case reside in places other than New York or Israel. Many witnesses already have been deposed in New York or are scheduled to be deposed here. Similarly, while some of the key documents with respect to the Note are in New York, many of the documents relating to the background stories are located in Russia. Accordingly, the court is of the opinion that this factor does not indicate that Israel would be a more appropriate forum than New York.

Fourth, this case has been litigated in New York for over two years. Early on, Mr. Chernoi moved to dismiss on the basis of *forum non conveniens*. The motion was denied. It clearly cannot be said, however, that Mr. Chernoi is engaging in last minute forum shopping. Mr. Chernoi, within the bounds of a largely jurisdictional argument, has actively advocated the merits of his case here. Much time in oral argument, and many of his written submissions, have been dedicated to the merits of his case. Furthermore, Mr. Chernoi moved for summary judgment here. The court considered this factor in finding jurisdiction in this case. It also

considers it now. While not dispositive by itself, the fact that Mr. Chernoi moved here for summary judgment indicates that he is not seriously disadvantaged by litigating the merits of his position in New York. *See Aganastou v Stibel*, 204 App Div 2d 61 (1st Dept 1994).

Fifth, neither Mr. Gliklad nor Mr. Chernoi resides here. However, discovery has demonstrated that Mr. Chernoi has a long history of business dealings in New York, and entities controlled by him are in active litigation or arbitration here. He has bank accounts here, pays taxes here, is the beneficial owner of two limited partnerships which are involved in business here and has admitted that he controls certain trusts here whose beneficiaries are his wife and daughter. Mr. Chernoi is not particularly uncomfortable doing business or litigating here.

Sixth, Mr. Gliklad previously brought an action for a declaratory judgment on the Note in Israel. This factor indicates that Mr. Gliklad, at least in the past, was comfortable availing himself of the Israeli courts in this matter. This factor weighs in favor of selecting Israel as the appropriate forum. Since that time, however, Mr. Gliklad was granted refugee status in Canada which, as noted above, impacts on his ability to litigate in Israel.

Seventh, Mr. Chernoi contends that his due process rights will be violated if the case is heard in New York, as he cannot attend a trial here or be present for any pre-trial activity. His briefs on this motion, however, do not explain why this is so. The court thus does not place weight on this factor.

As noted above, Mr. Gliklad's choice of venue for litigating a matter is accorded deference and Mr. Chernoi bears a heavy burden on a motion to dismiss for *forum non conveniens*. Weighing all the factors dealt with above, the court is of the opinion that New York is an appropriate forum for this litigation and for this reason denies Mr. Chernoi's motion.

Accordingly, it is

ORDERED that defendant's motion to dismiss pursuant to *forum non conveniens* is denied.

Dated: October 17 2011

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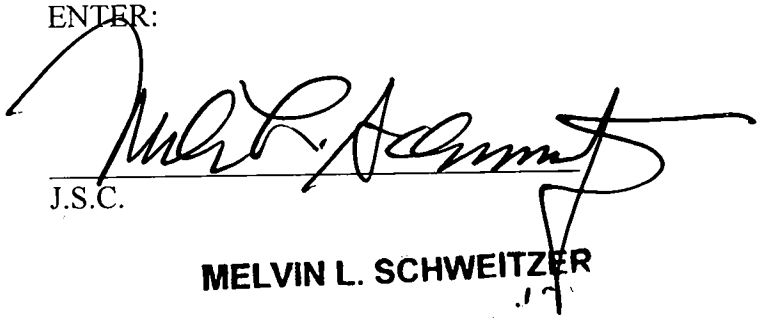

J.S.C.

MELVIN L. SCHWEITZER