

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

PRESENT **HON. BERNARD J. FRIED**

Justice

**E-FILE**

PART 60

Index Number : 603721/2008

JPS CAPITAL PARTNERS, LLC

VS.

SILO POINT HOLDING, LLC

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 603721-08

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO. \_\_\_\_\_

\_\_\_\_\_ 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

This motion is decided in accordance with the attached memorandum decision.

SO ORDERED

**FILED**  
**Aug 03 2009**  
NEW YORK  
COUNTY CLERK'S OFFICE

Scanned to New York EF on 8/3/09

Dated: 7/30/09

[Signature]  
**HON. BERNARD J. FRIED** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 60

-----X  
JPS CAPITAL PARTNERS, LLC,

Plaintiff,

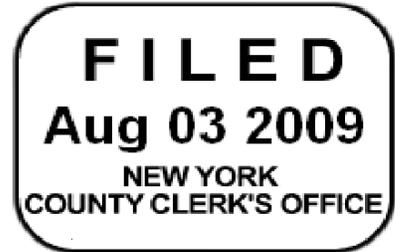
- against -

Index No.: 603721/08

SILO POINT HOLDING LLC, SILO POINT LLC,  
PATRICK TURNER, MARK SAPPERSTEIN, and  
NEIL RUTHER,

Defendants.

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**APPEARANCES:**

For Plaintiff:

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**FRIED, J.:**

Plaintiff, JPS Capital Partners, LLC (“JPS Capital”), brought this Complaint against Silo Point Holding LLC and Silo Point LLC (“Corporate Defendants”), and Patrick Turner (“Turner”), Mark Sapperstein (“Sapperstein”), and Neil Ruther (“Ruther”) (collectively “Defendants”). Plaintiff seeks damages for breach of contract, breach of the implied covenant of good faith and fair dealing, and under the theory of unjust enrichment, arising from Defendants’ failure to reimburse Plaintiff for money expended on behalf of Defendants while attempting to procure financing for Defendants’ pending real estate development project. Defendants bring the instant motion to dismiss for lack

of *in personum* jurisdiction, or in the alternative, dismiss on the ground of *forum non conveniens*.

JPS Capital is a New York limited liability company that provides and services secured loans from its office in New York City. (Compl. ¶ 9.) Corporate Defendants are Maryland limited liability companies, which primarily conduct business in Baltimore, Maryland; individual Defendants are the members of both Corporate Defendants and are Maryland residents. (Compl. ¶¶ 10-11, 13.)

Plaintiff alleges that in February 2006, non-party Andrew Weiss (“Weiss”) of Meridian Capital Group (“Meridian”) called JPS Capital in New York and solicited JPS Capital’s services on behalf of his clients, Defendants in this action. (See Shapiro Aff. ¶ 3.) Meridian maintains its headquarters in New York City (Shapiro Aff. Ex. 1.); however, Weiss called from a Maryland branch office of Meridian. (Shapiro Aff. ¶ 5.) As explained to Joel Shapiro, the representative of JPS Capital, by Weiss, Defendants sought a \$13 million mezzanine loan in connection with a real estate development project in Baltimore, known as “Silo Point.” (Shapiro Aff. ¶ 4.) Acting on behalf of Defendants, Weiss, from Maryland, sent informational materials on the Silo Point project to JPS Capital through the mail. Together with three of Weiss’ colleagues from the Meridian Maryland office, Meridian also sent more than 60 emails to JPS Capital in New York detailing information about the project, individual guarantors and the project’s primary lender. (Shapiro Aff. ¶¶ 6-7; *id.* at Ex. 2.)

Negotiations over the terms and conditions of the Term Sheet between JPS Capital and Meridian, on behalf of Defendants, continued from March through May of

2006 by email, telephone and regular mail. (Shapiro Aff. ¶ 8; *id.* at Ex. 2.) At some point, JPS Capital memorialized the general terms under which it would offer mezzanine financing for the Silo Point project. (Shapiro Aff. ¶ 10.) Turner, one of the Individual Defendants, signed the document as both “Managing Member” and “Authorized Representative of Borrower,” and sent the document back to JPS Capital in New York. (Shapiro Aff. ¶ 10; Cohen Aff. Ex. B.) Following further discussions with Meridian and Turner, JPS Capital prepared the Term Sheet, dated May 11, 2006, memorializing the final terms of securing the mezzanine loan and sent it to Meridian. (Shapiro Aff. ¶ 11.) Turner again signed the Term Sheet as “Managing Member” and “Authorized Representative of Borrower,” and returned it to JPS Capital in New York. (Shapiro Aff. ¶ 12.)

During the course of these negotiations, Plaintiff alleges that Defendants corresponded directly with JPS Capital in New York. Plaintiff references a letter sent directly to JPS Capital from Defendants accompanied by copies of cancelled checks required for JPS Capital’s due diligence.<sup>1</sup> (Shapiro Aff. ¶ 14.) Plaintiff also points to a bound booklet entitled “Silo Point Mezzanine Loan Request” as having been sent directly by Defendants to JPS Capital in New York. (Shapiro Aff. ¶ 15.)

Pursuant to the Term Sheet, (*see* Cohen Aff. Ex. B), JPS Capital engaged in extensive work to secure the mezzanine loan for Defendants in order to comply with its

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The letter was signed by “Stacy Sapperstein;” however, it does not actually indicate that she is writing as a representative of the Corporate or Individual Defendants. (Shapiro Aff. Ex. 4.)

obligations. (Compl. ¶ 26-40; Shapiro Aff. ¶ 16.) All of JPS Capital's work took place in New York. Plaintiff also alleges that it was always understood that the funding for the mezzanine loan would come from a New York hedge fund. (Compl. ¶ 16.)

Defendants move to dismiss the Complaint pursuant to CPLR § 3211 (a)(8) on the ground that this court lacks personal jurisdiction over Defendants, and in the alternative, to dismiss the Complaint pursuant to CPLR § 327(a) on the ground of *forum non conveniens*. (Defendants' Memorandum of Law in Support of Their Motion to Dismiss ["Def. Mem."], dated March 16, 2009, at 1.)

### ***In Personam* Jurisdiction**

Defendants argue that, because they have never resided in nor owned property in New York, have never traveled to nor sent representatives to New York to conduct business or negotiations in connection with the Term Sheet at issue, have never maintained offices in New York, and have never entered into any agreement selecting New York as a forum to litigate disputes, this court lacks personal jurisdiction over all of the defendants—Corporate and individual.<sup>2</sup> (Def. Mem. at 2.) Plaintiff, however, contends that Defendants fall within New York's long-arm statute, CPLR § 302 (a)(1),

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Defendants cite *Landoil Resources Corp. v. Alexander & Alexander Services, Inc.*, 563 N.Y.S.2d 739 (1990), as enunciating the appropriate test to determine whether there is jurisdiction. (Tr. 5-6; Def. Mem. at 4.) However, in *Landoil Resources Corp.*, the Court of Appeals only addressed whether personal jurisdiction existed under CPLR § 301, which required a continuous and systematic course of business to find "presence" in New York for corporate defendants. 563 N.Y.S.2d at 741. Plaintiff, here, does not assert that jurisdiction rests on presence in New York under CPLR § 301, but rather that jurisdiction exists under the long-arm statute, under CPLR § 302 (a)(1). Thus, *Landoil Resources Corp.* is inapplicable.

because Defendants' direct correspondence with JPS Capital in New York in connection with the mezzanine loan and use of an agent to solicit financing in New York constitute transacting business in this state. (Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss ["Pl. Mem."], dated April 21, 2009, at 14.)

It has long been recognized in New York that a defendant need not be physically present in this state to fall within the embrace of the "transacting business" prong of New York's long-arm statute. *Parke-Bernet Galleries, Inc. v. Franklyn*, 26 N.Y.2d 13 (1970).

The statute provides, in relevant part that:

As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state . . . .  
CPLR § 302 (a).

Under this statute, "proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 467 (1988). Communication by email, instant messaging, telephone and regular mail may properly be considered a projection into New York for the purpose of transacting business here. *Deutsche Bank Securities, Inc. v. Montana Bd. of Investments*, 7 N.Y.3d 65, 71 (2006) (upholding the exercise of jurisdiction over a Montana defendant, who knowingly initiated and pursued negotiations for a bond transaction with a New York corporation); *see also Fischbarg v. Doucet*, 9 N.Y.3d 375, 383 (2007) (holding that the long-arm statute

reached a California resident and corporation, who hired a New York lawyer without physically entering the state); *Parke-Bernet Galleries, Inc.*, 26 N.Y.2d at 17-18 (finding that a New York court had personal jurisdiction over a California resident, who participated in an auction in New York City via a live telephone line).

In *Deutsche Bank*, the plaintiff, a Delaware corporation with its principal place of business in New York, brought suit against the defendant, a Montana state agency, for breach of contract arising from a bond transaction that was negotiated primarily via instant messages and email between representatives of the corporations in New York and Montana. *Deutsche Bank*, 7 N.Y.3d at 69-70. Ultimately, the Court held that assuming that “a sophisticated institutional trader knowingly entering our state—whether electronically or otherwise—to negotiate and conclude a substantial transaction is within the embrace of the New York long-arm statute.” *Id.* at 72. While the defendant in *Deutsche Bank* also engaged in eight bond transactions with the same plaintiff prior to the transaction at issue in that case, Defendants overstate the weight that the Court gave to that fact. It is correct that the Court found the prior transactions to be evidence that the defendant purposefully availed itself of the benefits of conducting business in New York, the Court’s decision did not rest on this fact alone. *Id.* at 71-72. Instead, the Court found the defendants’ knowing initiation and pursuit of a transaction with a New York broker, as well as their direct communication with the New York broker, to be important factors supporting jurisdiction. *Id.*

Certainly, as Defendants point out, a finding of personal jurisdiction cannot rest on activities undertaken by Plaintiff on Defendants’ behalf, *see Glassman v. Hyder*, 23

N.Y.2d 354, 362 (1968); however, jurisdiction may be based on the “defendants’ solicitation of [the] plaintiff in New York and their frequent communications with him in this state.” *Fischbarg v. Doucet*, 9 N.Y.3d 375, 383 (2007). In *Fischbarg*, the Court found that California defendants—who hired a New York lawyer over the telephone to represent them in litigation in Oregon, sent a letter confirming the hire accompanied by relevant litigation documents, and stayed in constant communication with the attorney during the course of litigation—had the “quality of [] New York contacts” to be subjected to New York jurisdiction under § 302 (a)(1). *Id.* at 380-81. The Court held that the defendants transacted business in New York by projecting themselves into the New York legal services market by soliciting a New York attorney to represent them and engaging in frequent communication with him here. *Id.* at 383-84.

Additionally, the acts of the agent of an individual or corporation in New York are attributable to a non-domiciliary defendant. CPLR § 302 (a). The agency relationship need not be formally established; however, the agent must have engaged in purposeful activities in relation to the transaction at issue for the benefit of, and with the knowledge of, the non-domiciliary defendant and the defendant must have exercised at least some control over the agent in the matter. *Kreutter*, 71 N.Y.2d at 467.

Although Defendants are neither residents of New York, nor were they physically present in the state, to solicit JPS Capital’s assistance in obtaining a mezzanine loan or to negotiate the terms of the Term Sheet at issue in this case, their agent, Meridian, conducted a significant amount of business in New York through its continuous and prolonged communications with JPS Capital on behalf of Defendants to secure the

necessary mezzanine loan and to negotiate the Term Sheet. Defendants' agent deliberately solicited a New York company to secure its financing. Such negotiations for the mezzanine loan over a three-month period through over 60 emails, as well as conference calls and mailings, certainly constitute the "quality of contacts" between Defendants' agent and New York necessary to find that Defendants were transacting business in New York sufficient to satisfy the requirements of the long-arm statute.

Defendants contend that although Meridian has a New York office, it only ever dealt with Meridian's Maryland branch, and is thus analogous to the defendants' use of out-of-state brokers to effectuate trades in *State v. Samaritan Asset Management Services, Inc*, 22 Misc.3d 669 (N.Y. Sup. Ct. 2008). (Tr.<sup>3</sup> 3; Defendants' Reply Memorandum ["Def. Reply Mem."], dated May 12, 2009, at 3-4.) However, *Samaritan Asset* is distinguishable from this case. In *Samaritan Asset*, the out-of-state Defendants had no connection with New York and their out-of-state agent's only connection to New York was a clearing relationship with a New York organization that was not a part of the transaction at issue in that case. 22 Misc.3d at 677. Here, Defendants' agent engaged in knowing and purposeful activity in New York solely for the benefit of the Defendants. Furthermore, Defendants knew of Meridian's purposeful activities with JPS Capital in New York and had control over the transaction, as evidenced by the documents they sent to JPS Capital and the email negotiations.

Moreover, Defendants' connection to New York in relation to this litigation rests on more than their agency relationship with Meridian. Defendants corresponded *directly*

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<sup>3</sup> "Tr. \_\_\_" refers to the transcript from oral arguments on June 25, 2009.

with JPS Capital in New York. They played an active role in soliciting JPS Capital's services by providing information *directly* to JPS Capital in order to secure the financing—financing that was known to be originating from New York. Defendants were sophisticated investors using a sophisticated agent to negotiate and secure an agreement for financing in New York.<sup>4</sup> Through their own actions and their agents' actions, Defendants projected themselves into the New York financial services market and as such, fall within the embrace of the New York long-arm statute.<sup>5</sup>

### ***Forum Non Conveniens***

Defendants also argue that the action should be dismissed under the doctrine of *forum non conveniens* because the transaction took place in Maryland, the underlying real estate project was in Maryland, and Defendants and some non-party witnesses reside in Maryland. (Def. Mem. at 8.) Plaintiff replies that because there is no burden on New

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Defendants argue that the subject of this litigation is the property in Maryland that was to be developed as part of the Silo Point project since this is the reason they sought the mezzanine loan. However, the true subject of this action is the agreement to secure financing on Defendants' behalf. The location of the property has no bearing on that agreement.

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Having concluded that Defendants' contacts satisfy the definition of transacting business under CPLR § 302 (a)(1), I need not directly address whether they have "minimum contacts" with New York to satisfy due process. As noted by Defendants, the Court of Appeals has explained that "CPLR § 302 does not go as far as is constitutionally permissible." *Banco Ambrosiano, S.P.A. v. Artoc Bank & Trust Ltd.*, 62 N.Y.2d 65, 71 (1984). Therefore, while it is possible for a defendants' contacts to satisfy due process, but not the long-arm statute, *see id.*, it is not possible for a defendants' contacts to satisfy the long-arm statute, but not due process. *See Humitech Development Corp. v. Comu*, 16 Misc.3d 1109(A), at \*11 (Sup. Ct. N.Y. County July 11, 2007).

York Courts, nor Defendants, and the transaction occurred in New York, there is no reason to disturb the Plaintiff's choice of forum. (Pl. Mem. at 18-20.)

It is well-settled that New York courts "need not entertain causes of action lacking a substantial nexus with New York." *Martin v Mieth*, 35 N.Y.2d 414, 418 (1974). The doctrine of *forum non conveniens*, codified in 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, 478-479 (1984), *cert. denied* 469 U.S. 1108 (1985). The central focus of the *forum non conveniens* inquiry is to ensure that trial will be convenient, and will best serve the ends of justice. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Capitol Currency Exch., N.V. v. National Westminster Bank PLC*, 155 F.3d 603 (2d Cir. 1998), *cert. denied* 526 U.S. 1067 (1999). 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. *See id.*

New York courts consider the availability of an adequate alternative forum and certain other private and public interest factors when evaluating New York's nexus to a particular action, and deciding whether to dismiss an action on the ground of *forum non conveniens*. *Pahlavi*, 62 N.Y.2d at 479. The burden is on the defendant challenging the forum to demonstrate the relevant private or public interest factors that militate against accepting the litigation. *Id.*; *Anagnostou v. Stifel*, 204 A.D.2d 61 (1st Dept. 1994). Although not every factor is necessarily articulated in every case, collectively, the courts

consider and balance the following factors in determining an application for dismissal based on *forum non conveniens*: existence of an adequate alternative forum; situs of the underlying transaction; residency of the parties; the potential hardship to the defendant; location of documents; the location of a majority of the witnesses; and the burden on New York courts. See *Pahlavi*, 62 N.Y.2d at 479; *Shin-Etsu Chemical Co., Ltd. v. 3033 ICICI Bank Ltd.*, 9 A.D.3d 171, 176 (1st Dept. 2004); *World Point Trading PTE, Ltd. v. Credito Italiano*, 225 A.D.2d 153, 158-59 (1st Dept. 1996). A motion to dismiss on the ground of *forum non conveniens* is subject to the discretion of the trial court, and no one factor is controlling. *Pahlavi*, 62 N.Y.2d at 479; see also *In re New York City Asbestos Litigation*, 239 A.D.2d 303, 304 (1st Dept. 1997). However, "it is well-established law that 'unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.'" *Waterways Ltd. V. Barclays Bank PLC*, 174 A.D.2d 324, 327 (1st Dept. 1991) (citation omitted).

Here, there is a substantial nexus between this case and New York as evidenced by the relevant public and private interest factors. Defendants argue that the underlying transaction is the development project in Maryland; however, the agreement was about financing. The location of the actual property is not relevant to the terms of the agreement. The underlying transaction is for financing that was being obtained through a New York company from a New York hedge fund. Despite the fact that there are non-party witnesses, party witnesses, and documents concerning the negotiations in Maryland, there are also non-party witnesses, party witnesses and documents in New York. Furthermore, the alleged damages suffered by Plaintiff all arise out of the work Plaintiff

did, and fees Plaintiff incurred, in New York in meeting its obligations under the Term Sheet, and thus, all documents and witnesses regarding the actual amount Defendants allegedly owes are in New York.

Furthermore, there is no particular hardship to Defendants in litigating the case here. Defendants argue that the presence of non-party witnesses in Maryland constitutes a hardship; however, New York courts, particularly this division, have procedures in place, which are used everyday, to deal with out-of-state non-party witnesses. Moreover, there are non-party witnesses in New York as well, and so, either forum will require out-of-state witnesses to be subpoenaed and travel for this litigation. Thus, the location of non-party witnesses in Maryland does not present any particular hardship to Defendants and render New York an inconvenient forum.

There is also no undue burden on the New York courts in accepting this case. It is a straightforward breach of contract claim that does not appear to involve any novel or complicated issues of law. This case involves a commercial dispute of the type frequently brought in New York courts and of which this court is well-equipped to decide. Defendants failed to establish that there was anything particularly burdensome to New York courts in hearing this case.<sup>6</sup> *See, e.g., Humitech Development Corp. v. Comu*, 16

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Defendants assert the court's heavy docket in support of their contention that this action imposes a burden on the New York courts—arguing that dismissing the case would be one less case for this court's docket and relieve that burden. (Tr. 7-8.) Defendants' argument is unpersuasive, however, since every case would qualify using Defendants' logic making this factor always weigh in the balance of dismissal. This would directly conflict with the long-standing policy that "the plaintiff's choice of forum should rarely be disturbed." *See Waterways Ltd.*, 174 A.D.2d at 327.

Misc.3d 1109(A) at \*12 (Sup. Ct. N.Y. County July 11, 2007) (“The courts of New York will not be unduly burdened by [an] action, which involves a commercial dispute of the type frequently brought in the courts of this State and County.”).

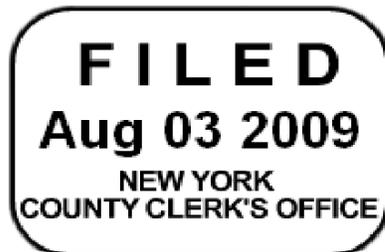
Although Maryland would be an adequate alternative forum, the mere existence of a viable alternative forum is not enough to dismiss on the ground of *forum non conveniens*. See, e.g., *Arbor Commercial Mortg., LLC v. Martinson*, 18 Misc.3d 178, 183 (Sup. Ct. Nassau County 2007) (finding that the availability of North Carolina as an alternative forum was not enough to support dismissal). Here, the balance of factors does not weigh heavily enough in Defendants favor to justify disturbing Plaintiff’s choice of forum, particularly because the Plaintiff is a New York company and Defendants failed to establish an undue burden on themselves or the courts in upholding Plaintiff’s choice. Moreover, the facts, as alleged, do establish a substantial nexus between New York and the transaction at issue sufficient for this court to retain this case.

Accordingly, it is:

**ORDERED** that Defendants’ motion to dismiss for lack of personal jurisdiction and *forum non conveniens* is denied.

Dated: 7/30/09

ENTER:



*[Handwritten Signature]*  
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J.S.C.  
**HON. BERNARD J. FRIED**