

SUPREME COURT OF THE STATE OF NEW YORK - N.Y.

PRESENT: BARBARA R. KAPNICK

PART 39

Justice

Local Space

INDEX NO. 601009/09

MOTION DATE _____

- v -

MOTION SEQ. NO. 03

Open Joint

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

PAPERS NUMBERED

Answering Affidavits - Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

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

Dated: 6/3/11



BARBARA R. KAPNICK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39**

-----X
LORAL SPACE & COMMUNICATIONS
HOLDINGS CORPORATION,

Plaintiff,

- against -

OPEN JOINT STOCK COMPANY OF LONG
DISTANCE AND INTERNATIONAL
TELECOMMUNICATIONS ROSTELECOM,

Defendant.

-----X
BARBARA R. KAPNICK, J.:

DECISION/ORDER

Index No: 601009/09
Motion Seq. No. 003

Plaintiff made loans totaling almost \$7 million, which were never repaid, to a company that was formed jointly by defendant and one of plaintiff's affiliates. In this action to recover damages for the unpaid loans, defendant now moves for an order dismissing the Complaint, pursuant to CPLR 3016 (b) and CPLR 3211 (a) (5), (7) and (8), on the grounds, respectively: that plaintiff has failed to plead its claims with sufficient particularity; that plaintiff's claims for tortious interference with contract and tortious interference with business relations are barred by the applicable statute of limitations and fail to state a cause of action; and that the court lacks personal jurisdiction over defendant.

BACKGROUND

Plaintiff Loral Space & Communications Holdings Corporation ("Loral") is a Delaware corporation with its principal place of business in New York. Defendant Open Joint Stock Company of Long Distance and International Telecommunications Rostelecom

("Rostelecom"), Russia's national telecommunications operator, is incorporated in the Russian Federation and has its principal office in Moscow.

According to the Complaint, Rostelecom "owns and operates an extensive fiber-optic ... network" which provides "voice, data and IP services to business and residential customers across the entire Russian Federation." In 1996, Rostelecom and one of Loral's affiliates, Globalstar, L.P. ("Globalstar"), formed a Russian company named Globalstar-Space Telecommunications Closed Joint Stock Company ("GlobalTel") as a vehicle for providing satellite-telephone services in Russia. Rostelecom owned 51%, and Globalstar owned 49%, of GlobalTel's stock.

Loral and GlobalTel entered into two loan agreements in September and December 2000 (the "Loan Agreements"), pursuant to which Loral loaned GlobalTel a total of \$6,876,600.00 and GlobalTel was to repay that amount by December 30, 2003. However, GlobalTel made only one payment of \$130,000.00 on the loans, and the remaining principal balance of \$6,746,600.00 was never repaid.

Globalstar filed for bankruptcy in 2001 and, by order of the Delaware Bankruptcy Court dated June 17, 2004, Globalstar's interest in GlobalTel was assigned to Loral. In and after April 2005, a wholly-owned subsidiary of Loral, named Loral Holdings

L.L.C. ("Loral Holdings"), allegedly owned the 49% equity interest in GlobalTel which had originally been held by Globalstar.

The Complaint alleges that on April 25, 2005, at a purported GlobalTel shareholder meeting of which Loral Holdings was unaware, Rostelecom unilaterally "approved a new charter abolishing [Loral Holdings'] veto and substantive participation rights" in GlobalTel. Rostelecom filed an annual report with the Securities and Exchange Commission for the year ending December 31, 2007 which stated that the approval of the new charter gave Rostelecom "effective control over GlobalTel." Loral alleges that after Rostelecom wrongfully abrogated Loral Holdings' shareholder rights, "GlobalTel became a mere instrumentality of Rostelecom, ceasing to have any independent or separate existence or decision making authority absent the control of Rostelcom." Rostelecom allegedly used its control over GlobalTel to cause GlobalTel to transfer its assets to Rostelecom -- leaving GlobalTel undercapitalized and without sufficient assets to pay its liabilities -- and to cause GlobalTel not to repay the loans from Loral.

Loral wrote two letters to GlobalTel in May and June 2006, concerning repayment of the loans, but GlobalTel did not respond. The Loan Agreements contained clauses which provided for the arbitration of disputes relating to those agreements in the London Court of International Arbitration, and Loral initiated arbitration proceedings against GlobalTel in that forum to recover the monies

owed. On or about March 23, 2007, the arbitrators issued two awards in Loral's favor against GlobalTel (the "Arbitration Awards"), which awarded Loral the \$6,746,000.00 in principal that was owed under the Loan Agreements together with interest and costs. Loral obtained two judgments from the Supreme Court of Arbitrazh of the Russian Federation, dated January 20, 2009 (the "Judgments"), which recognized the validity of the Arbitration Awards. On March 17, 2009, the Arbitrazh Court of the City of Moscow issued writs of execution on the Judgments. GlobalTel has nevertheless failed to pay Loral the monies owed under the Loan Agreements, the Arbitration Awards and the Judgments.

The Complaint asserts six causes of action: (1) alter ego liability, i.e., that Rostelecom is liable, as GlobalTel's alter ego, for the amounts owed to Loral under the Loan Agreements, the Arbitration Awards and the Judgments; (2) tortious interference with contract, i.e., the Loan Agreements; (3) tortious interference with judgment, i.e., the Judgments; (4) tortious interference with business relations; (5) constructive fraudulent conveyance, in that Rostelecom allegedly caused the fraudulent conveyance of GlobalTel's assets to Rostelecom; and (6) money had and received.

DISCUSSION

To successfully oppose Rostelecom's motion to dismiss for lack of personal jurisdiction, Loral bears the burden of establishing "that facts 'may exist' to exercise personal jurisdiction" over

Rostelecom (*Brinkmann v Adrian Carriers, Inc.*, 29 AD3d 615, 616 [2d Dept 2006] [citation and internal quotation marks omitted]). Loral asserts that Rostelecom is subject to the court's personal jurisdiction under three theories: (1) pursuant to CPLR 301, which provides for general jurisdiction, because Rostelecom is "doing business" in New York; (2) pursuant to CPLR 302 (a) (3) -- which provides for specific, long-arm jurisdiction -- because Rostelecom committed tortious acts outside of New York that caused injury to Loral within New York; and (3) under the principles that are generally used in determining whether there is personal jurisdiction over an alter ego, applied in conjunction with CPLR Article 53, which provides for the recognition of foreign country money judgments.

General Jurisdiction Under CPLR 301

"A foreign corporation is amenable to suit in New York courts under CPLR 301 if it has engaged in such a continuous and systematic course of 'doing business' here that a finding of its 'presence' in this jurisdiction is warranted" (*Landoil Resources Corp. v Alexander & Alexander Servs.*, 77 NY2d 28, 33 [1990]). "The test for 'doing business' is a simple [and] pragmatic one, which varies in its application depending on the particular facts of each case" (*id.* [citations and internal quotation marks omitted]). In order to determine that a foreign corporation is "doing business" in New York, "[t]he court must be able to say from the facts that the corporation is present in the State not occasionally or

casually, but with a fair measure of permanence and continuity" (*id.* at 33-34 [citation and internal quotation marks omitted]).

Loral contends that Rostelecom is "doing business" in New York because it: (a) maintains a so-called "point of presence" ("POP") in New York; (b) has entered into ongoing contracts with other telecommunications companies that are registered to do business in New York, and regularly makes and receives payments pursuant to those contracts; and (c) lists its American Depositary Shares ("ADSs") on the New York Stock Exchange ("NYSE").

Rostelecom's POP in New York is apparently a physical location at which its telecommunications network connects to the networks of New York or American telecommunications companies, for the purposes of enabling Rostelecom to provide its customers in the Russian Federation with the ability to initiate telephone calls and/or other transmissions to destinations in the United States, and the other telecommunications companies to provide their customers in the United States with the ability to initiate telephone calls and/or other transmissions to destinations in the Russian Federation.¹

¹ The Complaint alleges that POPs are "communications nodes, web servers and other telecommunications equipment that allow Rostelecom to maintain cost effective contacts and contracts with corporations local to the [POP] in order to provide continuous voice, data and IP services to those inside and outside the Russian Federation." Rostelecom's counsel has submitted an affirmation which states that Rostelecom's having "a virtual '[POP]' in New York ... means that [Rostelecom] leases channels of external operators to transmit data to or from American operators."

The contracts which Rostelecom has allegedly entered into with New York or American telecommunications companies appear to be contracts primarily of the type known as "interconnect" or "interconnection" agreements, which provide for Rostelecom's payment of specified rates to the other telecommunications companies for the United States "leg" of communications originated by Rostelecom's customers in the Russian Federation to destinations in the United States, and the other telecommunications companies' payment of specified rates to Rostelecom for the Russian leg of communications originated by customers of the other telecommunications companies in the United States to destinations in the Russian Federation.²

² According to Loral, in response to its document and deposition subpoenas, AT&T Corp. ("AT&T"), Verizon Business Network Service, Inc. ("Verizon") and Sprint Communications, L.P. ("Sprint") have "either produced ... documents or ... given Loral reason to believe that they have ongoing contractual relationships with Rostelecom that result in amounts regularly owing, and payments made, to Rostelecom." Loral further alleges that:

Rostelecom has a contractual relationship (commonly known as an "interconnect agreement") with AT&T typical for foreign phone companies whose customers send and receive calls to the United States.... This interconnect agreement provides that each party shall make payments to the other at specified rates for providing telephone access in the other's country. For instance, AT&T pays an agreed-upon rate to Rostelecom for calls made by AT&T's U.S. customers to Russia based on the call's length.... Rostelecom, in turn, pays AT&T, at a[n] ... agreed-upon rate, for calls originating in Russia that reach AT&T customers in the United States.

Rostelecom acknowledges that it has "entered into a small number of agreements with American telecommunications operators" which "enable the flow of telephone traffic to and from America for Rostelecom's Russian customers."

That Rostelecom maintains a POP in New York, and that it has entered into interconnect agreements with New York or American telecommunications carriers, are facts which may indicate that Rostelecom does business **with** New York. However, those facts are not a sufficient basis upon which to subject Rostelecom to general personal jurisdiction under the theory that it "does business" **in** New York (see e.g. *Access Telecom, Inc. v MCI Telecommunications Corp.*, 197 F3d 694, 717-718 [5th Cir 1999], cert den 531 US 917 [2000], [holding that a Mexican telecommunications carrier was not subject to general jurisdiction in Texas under a "doing business" theory although (1) its telecommunications lines crossed over the border into Texas, where they connected with the lines of American telecommunications carriers, and (2) it had entered into interconnection agreements with the American telecommunications carriers pursuant to which it regularly made and received payments]; *International Telecom, Inc. v Generadora Electrica del Oriente, S.A.*, 2002 WL 465291 at *5, [SDNY] [applying New York law, and holding that a Guatemalan telecommunications provider was not subject to general jurisdiction in New York on a "doing business" theory, although it received "revenue generated from international telephone calls placed between the United States (including New York) and Guatemala which, pursuant to bilateral agreements with U.S. telecommunications carriers, either originate or terminate in Guatemala"]; see also *Uzan v Telsim Mobil Telekomunikasyon Hizmetleri A.S.*, 51 AD3d 476, 477 [1st Dept 2008] [finding that a Turkish telecommunications company's having entered

into roaming agreements did not constitute "doing business" for the purpose of conferring general jurisdiction]).

Nor, in the absence of "other substantial contacts," is Rostelecom "doing business" in New York, and subject to jurisdiction for unrelated occurrences, merely because it maintains a listing on the NYSE and has issued ADSs which are traded on the NYSE, or because it may have taken ancillary steps to effect, maintain and/or facilitate that listing and issuance (*Pomeroy v Hocking Valley Ry. Co.*, 218 NY 530, 536 [1916] [recognizing that dividend payments and stock transfers could constitute some evidence of, but alone cannot suffice to establish jurisdiction]; *Grossman v Sapphire Petroleums Limited*, 195 NYS2d 851, 852 [Sup Ct Kings Co 1959] [that securities of a foreign corporation are traded on a stock exchange does not constitute "doing business" for purposes of jurisdiction]; see e.g. *Law Debenture v Maverick Tube Corp.*, 2008 WL 4615896 at *5, [SDNY], *aff'd* 595 F3d 458 (2nd Cir. 2010) [applying New York law and holding that a defendant which listed its shares on the NYSE in the form of ADSs was not subject to personal jurisdiction under the theory that it was "doing business" in New York].

In determining whether a defendant is "doing business" in New York, courts have traditionally considered factors such as whether the defendant has an office or employees in New York, regularly solicits business in New York, has real or personal property in New York and maintains a bank account in New York (see e.g. *Landoil*

Resources Corp. v Alexander & Alexander Servs., supra at 34; see also *Bresciani v Leela Mumbai-A-Kempinski Hotel*, 311 F Supp 2d 440, 444 [SDNY 2004] [applying New York law and citing *Bryant v Finnish Natl. Airline*, 15 NY2d 426, 432 (1965)]).

Loral has not alleged that Rostelecom has any of these contacts with New York, and Rostelecom has submitted an affirmation which asserts that it "maintains no offices in New York"; "has no employees based in New York"; "does not engage in any advertising or marketing activities directed at New York, [or] otherwise solicit customers in New York"; "owns no real property in New York"; and "has no tangible assets in New York." Loral does not dispute any of those assertions.

Accordingly, Loral has failed to allege facts which, either individually or in combination, would indicate that Rostelecom has engaged in a sufficiently continuous and systematic course of "doing business" in New York as to subject it to personal jurisdiction under CPLR 301.

Specific, Long-Arm Jurisdiction Under CPLR 302 (a) (3)

Loral also asserts that Rostelecom is subject to specific jurisdiction under subsection (a) (3) of CPLR 302, New York's long-arm statute.

In considering whether a non-domiciliary defendant may be subjected to jurisdiction under the long-arm statute, a court must first determine whether the defendant's relationship with New York satisfies the requirements of the language of CPLR 302 itself, and then whether the exercise of personal jurisdiction over the defendant would comport with the due process clause of the Fourteenth Amendment to the Constitution of the United States (see *LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214 [2000]).

CPLR 302(a) provides that,

[a]s 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 ... who ... 3. commits a tortious act without the state causing injury to person or property within the state ... if he:

- (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
- (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

Thus, in order to demonstrate that either subpart of CPLR 302 (a) (3) applies, Loral must first establish both that Rostelecom committed a tortious act outside of New York and, also, that Rostelecom's tortious act caused injury to Loral within New York. Assuming, arguendo, that each of the Complaint's causes of action adequately alleges that Rostelecom committed a tortious act outside New York, Loral has, nevertheless, failed to establish, as regards

any of those claims, that Rostelecom's alleged tortious act caused injury to Loral in New York.³

For purposes of CPLR 302 (a) (3), "the situs of the injury for long-arm purposes is where the event giving rise to the injury occurred, not where the resultant damages occurred" (*Uzan v Telsim Mobil Telekomunikasyon Hizmetleri A.S.*, supra at 478 [quoting *Marie v Altshuler*, 30 AD3d 271, 272 (1st Dept 2006)]; *O'Brien v Hackensack Univ. Med. Ctr.*, 305 AD2d 199, 201-202 [1st Dept 2003]).

³ In discussing the requirements of CPLR 302 (a) (3) (ii), Loral's memorandum of law asserts that Rostelecom does not dispute that Loral has satisfied the requirement that Rostelecom's allegedly tortious conduct must have caused injury to Loral in New York, and that Rostelecom disputes only that Loral has satisfied the "foreseeability" requirement, that is, the separate requirement for application of CPLR 302 (a) (3) (ii) that a defendant should reasonably have expected that its tortious act would have consequences in New York. However, a fair reading of Rostelecom's memorandum of law indicates that Rostelecom does dispute that Loral has satisfied the injury in New York requirement (see e.g. Def. Mem. of Law, at 7 [stating that, "(a)s explained above, this is not sufficient to establish any injury in New York"], and at 8 [stating that "proper jurisdictional analysis of (Loral's claims) rules out New York as the situs of Plaintiff's alleged injury," and that "the critical events that are the backbone of the alleged tortious conduct took place outside New York"]).

Perhaps because of the obvious relationship between the foreseeability requirement and the injury in New York requirement, courts, as well as litigants, have sometimes tended to "conflate" them (*Whitaker v Fresno Telsat, Inc.*, 87 F Supp 2d 227, 232 n 4 [SDNY 1999], *affd* 261 F3d 196 [2d Cir 2001]; see also *American Eutectic Welding Alloys Sales Co. v Dytron Alloys Corp.*, 439 F2d 428, 434 [2d Cir 1971] [also applying New York law and stating, in its discussion of the two distinct requirements, that, unless that court first concluded that there was injury in New York, it would not reach the foreseeability requirement]).

"[T]he residence or domicile of the injured person within a State is not a sufficient predicate for jurisdiction, which must be based upon a more direct injury within the State ... than the indirect financial loss resulting from the fact that the injured person resides or is domiciled there" (*Fantis Foods v Standard Importing Co.*, 49 NY2d 317, 326 [1980]). In order for CPLR 302 (a) (3) to be applicable, the injury to the plaintiff within New York "must be direct and not remote or consequential" (*Porcello v Brackett*, 85 AD2d 917 [4th Dept 1981], *affd* 57 NY2d 962 [1982]).

Loral's first cause of action alleges that Rostelecom is liable as GlobalTel's alter ego, because Rostelecom wrongfully obtained control of GlobalTel, and used that control to cause GlobalTel not to pay -- and/or to transfer GlobalTel's assets to Rostelecom, leaving GlobalTel without sufficient assets to pay -- the moneys owed to Loral under the Loan Agreements, the Arbitration Awards and the Judgments. Loral acknowledges that the tortious interference, fraudulent conveyance and money had and received claims which are alleged in the Complaint's second through sixth causes of action are similarly predicated upon allegations that Rostelecom tortiously "caused GlobalTel to fail to pay, or took from GlobalTel the money that should [have] been paid to, Loral."

Thus, the "original events" which followed from Rostelecom's purportedly tortious conduct, and which caused the injuries to Loral that are alleged in the Complaint, occurred not in New York but in Russia, in the context of the interactions between one

Russian company, Rostelecom, and another Russian company, GlobalTel.

. It was in Russia that Rostelecom allegedly asserted improper control over GlobalTel, used that control to wrongfully convey GlobalTel's assets to itself, and left GlobalTel unable to repay, or caused GlobalTel not to repay, the monies that it owed to Loral. It was in Russia that GlobalTel -- already having breached the Loan Agreements by failing to repay the loans by their due date, and whether by its own volition or as the result of control improperly exercised over it by Rostelecom -- decided not to pay, and/or was unable to pay, the monies owed to Loral. It was in Russia that GlobalTel and/or Rostelecom actually continued to withhold payment.

Accordingly, Loral has not established that the situs of its alleged injuries, for purposes of CPLR 302 (a) (3), was New York (see e.g. *Rivas v AmeriMed USA, Inc.*, 34 AD3d 250 [1st Dept 2006] *lv. dismiss in part, denied in part* 8 NY3d 908 [2007] [which held that a claim against a defendant "for tortious interference with contractual relations was subject to dismissal for lack of personal jurisdiction, since (the defendant) Arizona resident's alleged extra jurisdictional conduct was not adequately linked to injury in New York"]; (888) *Justice, Inc. v Just Enters., Inc.*, 2007 WL 2398504 at *4, [SDNY] [applying New York law and finding that the situs of the injury alleged by the plaintiff's claim for tortious interference with contractual relationships was not New York, where the plaintiff resided, but each of the other states where, as a

result of the tortious interference, a licensee resolved to sever its contractual relationship with the plaintiff]; *International Telecom, Inc. v Generadora Electrica del Oriente, S.A.*, supra at *2, [stating that "(w)hen the alleged act is tortious interference with contract, the location where the defendant allegedly interfered with the contract ... is the place of injury"]).

Although Loral alleges that it suffered financial damages in New York as the result of Rostelecom's tortious conduct, Loral has failed to allege or establish that its financial damages were connected with New York by anything other than the fact that Loral has its principal place of business here (see *Precision Concepts v Bonsanti*, 172 AD2d 737, 739 [2d Dept 1991]).

Loral has not alleged that its financial damages were connected with New York by any circumstance of the sort which courts have cited in finding that, for purposes of CPLR 302 (a) (3), the situs of a plaintiff's financial injury was New York, e.g., that the plaintiff's financial damages arose from the plaintiff's loss of customers, sales or business specifically within New York (see e.g. *Sybron Corp. v Wetzel*, 46 NY2d 197, 205 [1978]); the plaintiff's reliance, in New York, upon a misrepresentation or omission (see e.g. *Bank Brussels Lambert v Fiddler Gonzalez & Rodriguez*, 171 F3d 779, 792 [2d Cir 1999] [applying New York law]); or a defendant's purported tortious interference with a contract directed at avoiding a financial obligation to a New York entity and a contract that was wholly or

partially negotiated and/or executed in New York (see e.g. *National Westminster Bank PLC v Retirement Care Assoc., Inc.*, 1999 WL 239677 at *3 [SDNY]).⁴

"The occurrence of financial consequences in New York due to the fortuitous location of plaintiffs in New York is not a sufficient basis for jurisdiction under [CPLR] 302 (a) (3) where the underlying events took place outside New York" (*Whitaker v American Telecasting, Inc.*, 261 F3d 196, 209 [2d Cir 2001] [applying New York law; citation and internal quotation marks omitted]). The financial damages which Loral allegedly suffered in New York were a final economic consequence of Rostelecom's allegedly tortious conduct rather than the "original event(s)" which caused Loral injury, and, accordingly, Loral has failed to establish that it was injured within New York for purposes of CPLR 302 (a) (3), such that the exercise of long-arm jurisdiction over Rostelecom would fall within the intended reach of that provision.

Even assuming, arguendo, that Loral had established that the requirements of CPLR 302 (a) (3) were satisfied, this Court's exercise of personal jurisdiction over Rostelecom under that provision would not, in any event, comport with due process.

⁴ Loral asserts that it "is located in New York and should be paid in New York." However, a plaintiff's financial injury is not deemed to have occurred in New York, for purposes of CPLR 302 (a) (3), merely because a plaintiff alleges that it should have been paid money in New York which has not been paid (see e.g. *Northrop Grumman Overseas Serv. Corp. v Banco Wiese Sudameris*, 2004 WL 2199547 at *14 [SDNY] [applying New York law]).

The due process clause permits a state to exercise personal jurisdiction over a non-domiciliary defendant provided the defendant has "certain minimum contacts with [the forum State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'" (*LaMarca v Pak-Mor Mfg. Co.*, supra at 216 [citing to *International Shoe Co. v State of Wash.*, 326 US 310, 316 [1945]]). In order to "establish the minimum contacts necessary to justify 'specific' jurisdiction" under CPLR 302 (a) (3), a plaintiff "first must show that [its] claim arises out of or relates to [the defendant's] contacts with [the forum state]" (*Kernan v Kurz-Hastings, Inc.*, 175 F3d 236, 242-243 [2d Cir 1999]; see also *Sheldon Estates v Perkins Pancake House*, 48 AD2d 936, 937 [2d Dept 1975] [holding that, "(s)ince the (plaintiff's) cause of action did not arise out of defendant's activities within the State, jurisdiction (could) not be predicated upon any of the provisions found in CPLR 302"]; 29 NY Jur 2d, Courts and Judges § 592).⁵

Thus, Loral has failed to establish that Rostelecom has the prerequisite minimum contacts for the exercise of long-arm jurisdiction over Rostelecom, because the Complaint's causes of action do not arise out of, and are substantially unrelated to, Rostelecom's alleged contacts with New York -- i.e., its

⁵ The language of CPLR 302 (a) (3) itself would not appear to require that a plaintiff's claim necessarily arise from or relate to the defendant's activity within New York, although it does require that the plaintiff's claim arise from the defendant's out-of-state tortious act (see Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C302:12).

maintenance of a POP in New York, its ongoing contractual relationships with New York or American telecommunications companies, its maintenance of a listing on the NYSE and its issuance of ADSs that are traded on the NYSE. Accordingly, the court may not exercise personal jurisdiction over Rostelecom pursuant to CPLR 302 (a) (3) both because the requirements of that provision are not satisfied, and also because the exercise of such jurisdiction would offend due process.

Alter Ego Jurisdiction and CPLR Article 53

Loral argues that it in fact need not establish any basis for personal jurisdiction to recognize and enforce the existing money judgment against the judgment debtor, pursuant to Article 53 of the CPLR. Of course, the defendant is not suing the Judgment Debtor in this case - GlobalTel - but rather Rostelecom, which plaintiff asserts is GlobalTel's alter ego.

As an initial matter, Rostelecom argues in its Reply Memorandum that Loral cannot rely upon Article 53 as a jurisdictional basis for its Complaint, because Loral did not assert that basis for jurisdiction in the Complaint, but only, for the first time, in its papers in opposition to the instant motion to dismiss. The Complaint alleges that "[t]he Judgments are recognizable and subject to enforcement in New York pursuant to Article 53," but does not specifically allege that Loral is relying upon Article 53 as a basis for personal jurisdiction.

However,

[n]owhere in the CPLR's rules of pleadings is there any requirement of an allegation of the court's jurisdiction.... If the defendant moves to dismiss due to the absence of a basis for personal jurisdiction, the plaintiff must come forward with sufficient evidence, through affidavits and relevant documents, to prove the existence of jurisdiction.

Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C302:5. See also *Fischbarg v Doucet*, 9 NY3d 375, 381 n 5 [2007]. Thus, the fact that Loral's Complaint did not expressly allege Article 53 as a basis for jurisdiction does not preclude Loral from now arguing that Rostelecom is subject to personal jurisdiction pursuant to Article 53.

Loral has, nevertheless, failed to establish that this Court may exercise jurisdiction over Rostelecom pursuant to Article 53.

New York adopted the Uniform Foreign Money-Judgments Recognition Act as Article 53 of the CPLR in 1970, primarily in order to "promote the efficient enforcement of New York judgments abroad by assuring foreign jurisdictions that their judgments would receive **streamlined** enforcement here" (emphasis added) (*CIBC Mellon Trust Co. v Mora Hotel Corp.*, 100 NY2d 215, 221 [2003], cert denied 540 US 948 [2003]). Article 53 provides that a "foreign country judgment which is final, conclusive and enforceable where rendered" (CPLR 5302) shall be "conclusive" in New York, "between the

parties" to the foreign country judgment, "to the extent that it grants or denies recovery of a sum of money" (CPLR 5303).

The "streamlined" nature of the enforcement which Article 53 authorizes is possible, in substantial part, because a judgment creditor who brings such a proceeding "does not seek any new relief against the judgment debtor" -- or, a fortiori, against any other party -- but "merely asks the court to perform [the] ministerial function of recognizing the foreign country money judgment and converting it into a New York judgment" (*CIBC Mellon Trust Co. v Mora Hotel Corp.*, supra at 222, citing *Lenchyshyn v Pelko Elec.*, 281 AD2d 42, 49 [4th Dep't. 2001]).

Loral asserts that, having "obtained [the Judgments] against GlobalTel in Russia," it "now seeks to recognize and enforce these judgments against Rostelecom ... pursuant to Article 53." According to Loral, the Judgments can be enforced against Rostelecom as the alter-ego of GlobalTel, if the court finds, "(1) common ownership, which is essential; (2) financial dependency of the subsidiary on the parent; (3) the degree to which the parent interferes in the selection and assignment of the subsidiary's personnel and fails to observe corporate formalities; and (4) the degree of control that the parent exercises over the subsidiary's marketing and operational policies." (*Storm LLC v Telenor Mobile Comm.*, 2006 WL 3735657 at *13 [SDNY]).

It is clear that Loral cannot obtain recognition and enforcement of the Judgments as against Rostelecom in New York based solely upon Article 53, because by its express terms, it requires an identity of parties between the original foreign country judgment and any recognition and enforcement proceeding in New York (CPLR 5303).

Nor can this court issue a judgment against Rostelecom predicated upon the Judgments as the alter-ego of GlobalTel, as such a judgment would go well beyond a merely ministerial recognition by the court of a foreign country money judgment. Rather, it would require the determination of issues that have not previously been litigated, including the issue of whether Rostelecom can be held liable, as GlobalTel's alter ego, for the moneys owed by GlobalTel under the Loan Agreements, the Arbitration Awards and the Judgments.

Loral can point to no case in which a New York court has applied principals of alter-ego liability in order to enforce a foreign country judgment pursuant to Article 53. Although Loral relies heavily on the decision in *Storm LLC v Telenor Mobile Communications*, supra, that case is inapposite. In *Storm*, unlike in the instant action, there was no dispute that the court had grounds to exercise personal jurisdiction over both named parties to the action. The defendant in *Storm* argued, successfully, that the court could exercise jurisdiction over two non-parties for purposes of enjoining them from commencing or continuing litigation

against it in Ukraine courts, based on the assertion that they were acting as the alter-egos of plaintiff (2006 WL 3735657 at *13-14). Additionally, the *Storm* case involved arbitration pursuant to a shareholders' agreement, and did not address enforcement or recognition of any foreign country judgment or the applicability of alter-ego liability to such enforcement or recognition.

Finally, for this Court to issue a determination that Rostelecom is the alter-ego of GlobalTel would constitute new relief, which would be at least partially non-monetary, against an entity which was not a party to the Judgments (*cf. Johnson v Ventra Group, Inc.*, 191 F3d 732, 739 [6th Cir 1999] [finding that the Uniform Foreign Money-Judgments Recognition Act, adopted as Mich Comp Laws 691.1151-1159, was inapplicable to the plaintiff's claim seeking to enforce a foreign judgment, because the foreign judgment had not been obtained against either of the defendants named in the Michigan case]).

Jurisdictional Discovery

Finally, Loral argues that should the Court determine that it has failed to establish an adequate basis for the exercise of personal jurisdiction over Rostelecom, the Court should direct the parties to engage in "jurisdictional discovery to allow Loral to show that Rostelecom is present in New York sufficient to establish personal jurisdiction." Loral contends that it has made a "sufficient start" warranting further discovery on the issue of personal jurisdiction by submitting evidence regarding Rostelecom's

POP in New York, its ongoing contractual relationships with New York or American telecommunications companies, and its maintenance of a listing on the NYSE for its ADSs.

It is true that, "in opposing a motion to dismiss pursuant to CPLR 3211 (a) (8) on the ground that discovery on the issue of personal jurisdiction is necessary, plaintiffs need not make a prima facie showing of jurisdiction, but instead must only set forth 'a sufficient start, and show[] their position not to be frivolous'" (*Shore Pharm. Providers, Inc. v Oakwood Care Ctr., Inc.*, 65 AD3d 623, 624 [2d Dept 2009] [citations omitted]; see also *American BankNote Corp. v Daniele*, 45 AD3d 338, 340 [1st Dept 2007]; *Edelman v Taittinger, S.A.*, 298 AD2d 301, 302 [1st Dept 2002])).

However, "[i]n order to obtain jurisdictional discovery pursuant to CPLR 3211 (d), plaintiffs must demonstrate the possible existence of essential jurisdictional facts that are not yet known" (*Copp v Ramirez*, 62 AD3d 23, 31 [1st Dept 2009], *lv den.* 12 NY3d 711 [2009]; see also *Peterson v Spartan Indus.*, 33 NY2d 463, 466 [1974])).

It does not appear from the Complaint or the evidence which Loral has submitted that "facts essential to justify opposition may exist, but cannot now be stated" (*id.* at 31-32 [citation and internal quotation marks omitted]). Loral has neither offered "tangible evidence which would constitute a 'sufficient start' in

U N F I L E D J U D G M E N T

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 EFile a "Request for Entry of Judgment, Proposed Judgment, and any supporting documents on the NYSCEF system.

showing that jurisdiction over Rostelecom (SNS Bank v Citibank, 7 AD3d 352, 353 [1st Dept 2004] [citation and internal quotation marks omitted]; nor advanced any non-speculative, non-conjectural ground for a belief that the discovery requested by Loral would reveal evidence supporting the exercise of jurisdiction over Rostelecom (see Greenblatt v Gluck, 15 AD3d 317, 318 [1st Dept 2005]; Warck-Meister v Diana Lowenstein Fine Arts, 7 AD3d 351, 352 [1st Dept 2004]).

CONCLUSION

For the foregoing reasons, this Court finds that it lacks personal jurisdiction over Rostelecom, and the Complaint must be dismissed. Thus, the Court does not reach Rostelecom's other grounds for dismissal.

Accordingly, it is hereby

ORDERED that the motion by defendant Open Joint Stock Company of Long Distance and International Telecommunications Rostelecom to dismiss is granted and the Complaint is dismissed with prejudice, and without costs or disbursements.

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of this Court.

Dated: June 2, 2011


BARBARA R. KAPNICK
J.S.C.


BARBARA R. KAPNICK
J.S.C.

FILED 24
Jun 06 2011
NEW YORK
COUNTY CLERK'S OFFICE