

Aintabi v Horn

2009 NY Slip Op 32805(U)

November 15, 2009

Supreme Court, New York County

Docket Number: 108363-09

Judge: Jane S. Solomon

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

DECEMENT. **JANE S. SOLOMON**

PART 55

Index Number : 108363/2009

AINTABI, JASON

vs.

HORN, JONATHAN B.

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

Justice

INDEX NO. 108363-09

MOTION DATE 2/11/09

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

were read on this motion to/for _____

PAPERS NUMBERED

1-3

4-5

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 *is decided in*
accordance with the enclosed memorandum decision
and order.

FILED
 DEC 02 2009
 NEW YORK
 COUNTY CLERK'S OFFICE

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

Dated: 11/25/09

JANE S. SOLOMON 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 55

-----X
JASON AINTABI and JESTA CAPITAL INC.,

Plaintiffs,

DECISION and ORDER

-against-

Index No. 108363/09

JONATHON B. HORN,

Defendant.

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-----X
JANE S. SOLOMON, J.S.C.:

Defendant Jonathan B. Horn moves, pursuant to CPLR 3211 (a) (8), for an order dismissing the complaint, or in the alternative, for an order, pursuant to CPLR 3211 (a) (4), removing and consolidating this action with an action that he has commenced against plaintiffs, and others, in the United States District Court for the Southern District of New York.

Plaintiffs reside in New York and are engaged in the real estate business. The complaint, which asserts a single cause of action for defamation, alleges that, in or about December 2008, in New Jersey, defendant made a defamatory statement about plaintiffs to one Alan Schoening, who operates a business that does business with plaintiffs. The complaint further alleges that defendant, a resident of New Jersey, was retained by plaintiff, Jason Aintabi to perform certain services as an independent contractor related to the acquisition of residential mortgage loans, a relationship that ended on or about September 18, 2008.

Defendant argues that this court lacks personal jurisdiction over him because he has not transacted business in

New York since September 2008, and because service of process has not been properly effected on him. With regard to the first of those issues, plaintiffs contend that defendant repeatedly transacted business in New York in the course of his business relationship with plaintiffs; that the alleged defamatory statement, to wit, that plaintiffs "don't close," arose out of that relationship; and that, therefore, defendant is subject to the jurisdiction of this court, pursuant to CPLR 302 (a) (1).

CPLR 302 (a) (1) provides for personal jurisdiction over a non-domiciliary defendant who "transacts any business within the state," but only "if the cause of action asserted arises out of that transaction." *Ehrenfeld v Bin Mahfouz*, 9 NY3d 501, 508 (2007). In order for jurisdiction to attach, there must be a "substantial nexus" between the cause of action and the New York transaction. *Johnson v Ward*, 4 NY3d 516, 519 (2005), quoting *Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 (1988). Here, plaintiffs argue that defendant's alleged defamatory statement is based upon the business that defendant transacted in New York on behalf of plaintiffs, and they note that the website of defendant's current company describes defendant as having been the Senior Managing Director at plaintiff Jesta Capital, Inc. (a position somewhat at variance with plaintiffs' description of defendant as an independent contractor).

In *Legros v Irving* (38 AD2d 53 [1st Dept 1971]), the first case in which a New York appellate court upheld jurisdiction over a non-domiciliary defendant against whom a

defamation claim had been raised, the defendant had performed substantial work in New York on the book in which the alleged libel was published; he had negotiated his contract with the publisher in New York; and the book had been printed in New York. Similarly, in *Montgomery v Minarcin* (263 AD2d 665, 668 [3rd Dept 1999]), the plaintiff alleged that the defendant had engaged in purposeful journalistic activity in New York that was "directly related to and form[ed] the basis of [the] plaintiff's causes of action" for defamation. So too, in *GTP Leisure Products, Inc. v B-W Footwear Company, Inc.* (55 AD2d 1009, 1010 [4th Dept 1977]), the allegedly defamatory statement, made out of state, subjected the non-domiciliary defendant to the jurisdiction of the New York court because the subject of the statement was "a decisive ingredient" in the transaction in which the defendant had engaged, in New York.

By contrast, where a libel defendant engaged in purposeful activity in New York, but the alleged defamation did not arise directly from that activity, the courts have held that personal jurisdiction does not lie. Thus, in *Talbot v Johnson Newspaper Corp.* (71 NY2d 827 [1988]), the alleged libel was based on observations that had been made, and conclusions that had been drawn, by one of the defendants, Patricia MacLaren, who had attended college in New York state, and graduated two years prior to the publication of the alleged libel. The Court held that there was an insufficient nexus between the plaintiffs' cause of action and Ms. MacLaren's activities in New York for jurisdiction

to attach. Similarly, in *Copp v Ramirez* (62 AD3d 23, 29 [1st Dept 2009]), the Court held that the nexus between the allegedly libelous statements, made out of state, and the observations that formed the basis for those statements, made in New York three years earlier, was too "attenuated" to serve as a basis for personal jurisdiction.

Here, the allegedly defamatory statement was made some two months after the latest time that defendant could have made observations, in the course of his New York activities, giving rise to the alleged statement. While that interval is far less than the intervals in *Talbot*, and in *Copp*, the insufficiency of a nexus between in-state transactions and an allegedly defamatory statement is not constituted solely by the passage of time between the former and the latter. The Legislature's protection of the constitutionally guaranteed freedoms of speech and the press, through the exclusion of claims alleging defamation from the tort provisions of CPLR 302 (a) (2) and (3), is not undermined by upholding long-arm jurisdiction, pursuant to CPLR 302 (a) (1), where an allegedly defamatory statement is embedded directly in the product of the business that the defendant has transacted in New York, as in *Legros v Irving* (38 AD2d 53, *supra*), and *Montgomery v Minarcin* (263 AD2d 665, *supra*), or where it directly concerns a central feature of a New York transaction, as in *GTP Leisure Products, Inc. v B-W Footwear Company, Inc.* (55 AD2d 1009, *supra*). Here, however, the allegedly defamatory statement was neither made in the product of transactions in

which defendant engaged in New York, nor is it directly about any such transactions. Indeed, the offending statement could have been made even had defendant not engaged in any transactions in New York. Plaintiff has not adduced, and this court is not aware of, any case that holds that a non-domiciliary defamation defendant is subject to the long-arm jurisdiction of the state, pursuant to CPLR 302 (1) (a), where the alleged transactions in New York are not necessarily the but-for basis of the alleged defamatory statement.

In view of the discussion above, the court need not discuss defendant's alternative grounds for dismissal, or removal. Accordingly, it hereby is

ORDERED that the motion to dismiss is granted, and the action is dismissed with costs and disbursements as calculated by the Clerk of the Court upon the submission of an appropriate bill of costs.

Dated: November 15, 2009

ENTER:



 J.S.C.
 JANE S. SOLOMON

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