

**Straightline International, Inc. v Investcorp
International Limited**

2006 NY Slip Op 30237(U)

January 23, 2006

Supreme Court, New York County

Docket Number: 0601564/2005

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 601564/2005

STRAIGHTLINE INTERNATIONAL INC

vs

INVESTCORP INTERNATIONAL LTD

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE 11/28/05

MOTION SEQ. NO. _____

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 ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-2
3-5
6

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

M.B. — preliminary conference scheduled for Feb. 27, 2006 at 11 AM.

FILED

JAN 30 2006

NEW YORK COUNTY CLERK'S OFFICE

JANE S. SOLOMON

Dated: 1/23/06

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 55

-----X

STRAIGHTLINE INTERNATIONAL, INC.,

Plaintiff,

DECISION AND ORDER

-against-

Index No. 601564/05

INVESTCORP INTERNATIONAL LIMITED,

Defendant.

-----X

JANE S. SOLOMON, J.:

Defendant Investcorp International Limited

("Investcorp") moves to dismiss this action for breach of contract on the grounds that this court does not have personal jurisdiction over it, or alternatively, because this is an inconvenient forum for the dispute. The motion is denied for the reasons below.

Plaintiff Straightline International, Inc.

("Straightline") is a New York City-based advertising company, and part of its business involves preparing corporate annual reports. It claims that Investcorp engaged it to prepare an annual report for the year 2000, and failed to pay the entire amount due.

Investcorp submits the affidavit of its director, Lawrence B. Kessler, to the effect that it has no employees in New York and derives no revenues at all from any activity

associated with New York. It has a sister corporation, Investcorp International, Inc. ("Investcorp Inc."), which is incorporated in Delaware and maintains headquarters on Park Avenue in New York City. However, Investcorp maintains strong corporate formalities to separate itself from its New York sister and their parent corporation, Investcorp Bank B.S.C. ("Investcorp Bank"). Although Investcorp contracted with Straightline to produce the annual reports, it did so on behalf of Investcorp Bank. Kessler states that the contract with Straightline was negotiated either in London or over the telephone, and that the majority of witnesses and documents are located in London.

Straightline relies on the allegations in the complaint and the affidavit of its employee, James Hatch. The facts and documents he presents are not significantly contested. For many years, Investcorp has engaged Straightline to perform advertising work. Investcorp contacted Straightline and hired it to produce an annual report for the "Investcorp Group" for the year 1998. Straightline produced the report as agreed. The 1998 report states that the company "acts as a principal and an intermediary in international investment transactions." Exhibit A to opposing papers. The report indicates that "Investcorp Group" has offices in New York City, London, England and Manama, Bahrain, and features photographs of its office buildings in those cities.

The following year, Investcorp again contacted Straightline, requesting that it produce an annual report for 1999. Straightline prepared the report as agreed. A year later, Investcorp again contacted Straightline and requested that it prepare an annual report for 2000. Investcorp prepared a report, but Investcorp refused to pay an invoice for photographic work in the amount of approximately \$40,000, and this lawsuit ensued, albeit in a round-about way.

Straightline alleges that it engaged a photographer through Magnum Photos, Inc. ("Magnum") to photograph executives of Investcorp and related entities in connection with the 2000 report. Magnum arranged for photo shoots in New York, London and Bahrain, and billed them to Straightline. Investcorp rejected the photographs and refused to pay the Magnum invoice.

According to a letter from Investcorp to Straightline, dated January 7, 2000 and annexed to the opposing papers at Exhibit F, Investcorp concerns regarding the quality of the photographs first were raised verbally in New York by a person named Jo Crosland. Straightline attempted to enhance the photographs, but the enhanced photographs also were rejected at a London meeting and by telephone. The letter indicates that Investcorp made specific demands regarding how the photo shoots would be conducted. The writer complains that "there often were

no Polaroids available to enable us to monitor progress", and that "In New York we shipped, at some cost, a large number of props to dress the room in the Four Seasons¹ to resemble our office environment. None of them were used and the resulting backgrounds are not consistent with the London and Bahrain environments." Several other specific complaints are registered, which together suggest that Investcorp monitored and controlled the New York activities.

When Investcorp refused to reimburse Straightline for Magnum's fee, Straightline in turn withheld payment from Magnum. Magnum sued Straightline for the fee in New York, which claim was settled before trial in the amount of \$24,000. Straightline commenced a lawsuit against Investcorp Inc., the New York entity, which moved to dismiss on the grounds that the Investcorp entity which engaged Straightline was the defendant herein. That lawsuit was dismissed by order of a justice of this court.

Investcorp submits the reply affidavit of Deborah Botwood Smith, who states that she is a director of Investcorp Bank, and an employee of Investcorp, and the head of corporate communications for Investcorp Group (she does not explain the

¹ Executives of Investcorp entities were photographed at New York's Four Seasons Hotel. Investcorp's counsel implies that Investcorp rented rooms at the Hotel for the photo shoot.

relationship between Investcorp Group and the other entities). She was the senior Investcorp employee responsible for dealing with Straightline in connection with the annual report. She claims that Mr. Hatch was not Straightline's project manager at the time (she names Michael Villane as the project manager, who is the recipient of the January 7, 2000 letter at a New York address), but otherwise disputes no material fact in the opposing papers.

The crux of Investcorp's argument is that it is based in London, England; that the contract with Straightline was not negotiated in New York and does not suggest any meaningful connection with New York; that Investcorp does no business in New York; that it has no New York presence; and that it has scrupulously observed corporate formalities such that the presence of its sister corporation in New York may not be construed as a meaningful contact with this jurisdiction.

DISCUSSION

A. Personal Jurisdiction

Investcorp contends that it is not subject to this court's jurisdiction under New York's long arm statute. CPLR 302. "Under CPLR Section 302 (subd. (a), par 1), the courts of this state are authorized to exercise in personam jurisdiction over a nondomiciliary if the cause of action at issue arose out

of the transaction of business within the state." McGowan v. Smith, 52 NY2d 268, 271 (1981). In order for jurisdiction to exist, there must have been some "'purposeful activities' within the state that would justify bringing the nondomiciliary defendant before the New York courts." Id., citations omitted; and see, Burger King Corp. v. Rudzewicz, 471 US 462 (1985). There must also be a substantial relationship between the purposeful activity and claim against the nondomiciliary. Deutsche Bank Securities, Inc. v. Montana Bd. of Investments, 21 AD3d 90 (1st Dept 2005).

The Court of Appeals has recognized that CPLR 302 is a "single-act statute requiring but one transaction - albeit a purposeful transaction - to confer jurisdiction in New York." Parke-Bernet Galleries v. Franklyn, 26 NY2d 13, 17 (1969). Generally, telephone calls alone are not enough to establish jurisdiction, but they may be sufficient if used by the defendant to project itself into a business transaction occurring within New York State. Deutsche Bank Securities, supra. The burden of proving jurisdiction rests with the party asserting it. Armouth Intern., Inc. v. Haband Co., Inc., 277 AD2d 189, 190 (2d Dept. 2000).

Investcorp repeatedly engaged Straightline's services in New York. Straightline used a New York photographic agency to

perform the work in question, and participated with Investcorp in staging a New York photo shoot that was actively overseen by Investcorp personnel. The January 6, 2000 letter, the content and legitimacy of which is not contested, is evidence that Straightline's activities were supervised in New York by Investcorp, on whose behalf "Jo Crosland" first voiced displeasure over the photographs in December 1999. Investcorp also caused props to be shipped "at some cost" to New York in order to impose its will on how the New York photographs would be taken, and upon their content.

Investcorp argues that the annual report it contracted for was not its own, but was created for the benefit of other Investcorp entities (Kessler affirms that the report was created for Investcorp Bank, and Smith claims it was created for Investcorp Group). Apparently, these facts are offered to explain why the annual reports not only make prominent reference to an Investcorp office in New York, but feature photographs of same. However, they undercut Kessler's assertion that Investcorp scrupulously observes corporate formalities and does not conduct business as the alter-ego of an entity clearly doing business in New York.

On the whole, Straightline has established that Investcorp transacted business in New York, and the court finds

that the exercise of jurisdiction in this case comports with due process. La Marca v Pak-Mor Mfg. Co., 95 NY2d 210 (2000).

Accordingly, Investcorp's motion to dismiss for lack of jurisdiction under the long arm statute is denied.

Investcorp also contends, incorrectly, that the complaint must be dismissed because it is facially defective in that it does not state a basis for jurisdiction over a non-domiciliary defendant. The decisions cited by Investcorp in support of this argument are made pursuant to Article 4 of the Uniform District Court Act, which is not applicable to actions in this court.

B. Forum Non Conveniens

Alternatively, Investcorp argues that this lawsuit should not be heard in New York because most witnesses and relevant documents are located in London.

It is well established that New York courts are not compelled to retain jurisdiction in any case which has no substantial nexus to New York (see, Banco Ambrosiano, S.P.A. v Artoc Bank & Trust Ltd., 62 NY2d 65, 73 [1984]). Under the doctrine of forum non conveniens, a court may dismiss an action, even when it has jurisdiction over the parties and the claim, if the court believes that "in the interest of substantial justice the action should be heard in another forum" (CPLR 327[a]).

Dismissal of an action pursuant to CPLR 327 is discretionary; "its application should turn on considerations of justice, fairness and convenience and not solely on the residence of one of the parties." Silver v Great Am. Ins. Co., 29 NY2d 356, 361 (1972); see also, Islamic Republic of Iran v Pahlavi, 62 NY2d 474 (1984), cert denied 469 US 1108 (1995). Numerous factors may be considered in order to determine whether a matter should be dismissed by reason of forum non conveniens, including, but not limited to, the potential hardship to defendants, the availability of a viable alternative forum, the situs of the underlying action, the lack of a sufficient nexus between New York and the matters raised in the action, and the burden which will be imposed upon the New York courts, with no one single factor controlling (Islamic Republic v Pahlavi, supra, at 481 and 484).

Investcorp claims that most witnesses are located in London, but does not identify a single London witness. It claims no hardship that would impair its ability to litigate in New York. It argues that the parties in New York and London will need to examine original photographs, but this does not demonstrate why London is a better venue for litigation as it presents at least as great a hardship on the New York party as on the London one.

On the other hand, Straightline is based in New York; Investcorp's initial critique of the subject photographs was offered in New York; Magnum is located in New York; the photographer was hired in New York and presumably is based here himself (there is no evidence to the contrary, and none that London is a more convenient venue for him); and the underlying incidents involve a photo shoot that occurred in New York. In short, there is a nexus between the claim and this jurisdiction. Investcorp has failed to demonstrate that litigating the matter here would inconvenience any witness, even its own employees. Taking all the relevant factors into consideration, justice, fairness and convenience are served by denying this branch of the motion. Accordingly, it hereby is

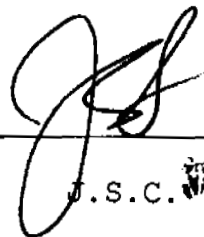
ORDERED that Investcorp's motion to dismiss is denied; and it further is

ORDERED that counsel shall appear for a preliminary conference in Part 55, 60 Centre Street, Room 432, New York, NY 10007 on February 27, 2006 at 11 AM.

Dated: January 23, 2006

FILED
 JAN 30 2006
 NEW YORK
 COUNTY CLERK'S OFFICE

ENTER:



 J.S.C. **WALTER S. SLOAN**