

**Whitehaven P.I. Fund, LLC v Nokley**

2007 NY Slip Op 30940(U)

April 20, 2007

Supreme Court, New York County

Docket Number: 0112379/2006

Judge: Judith J. Gische

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

PRESENT: **JUDITH J. GISCHE, J.S.C.**

PART \_\_\_\_\_

Index Number : 112379/2006

WHITEHAVEN P.I.FUND LLC.

vs  
NOKLEY, ROBERT

Sequence Number : 001

DISMISS ACTION

C

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
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

*See accompanying memorandum decision.*

**FILED**  
APR 26 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 4/20/07

*JJG*  
\_\_\_\_\_  
**JUDITH J. GISCHE, J.S.C.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: PART 10

-----x  
WHITEHAVEN P.I. FUND, LLC,  
  
Plaintiff,

**Decision/Order**  
Index No.: 112379/06  
Seq. No. : 001

-against-

ROBERT NOKLEY and PRE-SETTLEMENT  
HEALTHCARE FUNDING, LLC,

Present:  
Hon. Judith J. Gische  
J.S.C.

Defendants.  
-----x

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Def's motion [dismiss] w/FAA affid in support .....	1
Pltf's cross mtn [sanc] & affirm in opp (MF) w/exhs .....	2
Def's reply & affirm in opp (FAA) w/exhs .....	3

-----x

*Upon the foregoing papers, the decision and order of the court is as follows:*

This is an action by plaintiff Whitehaven P.I. Fund, LLC ("Whitehaven") for damages arising from an alleged tortious interference of contract. Before the court is defendants' motion to dismiss this action for lack of jurisdiction. CPLR § 3211 (a).

**Background**

Defendants are Robert Nokley ("Nokley") and Pre-Settlement Healthcare Funding, LLC ("PSHF"). Both Whitehaven and PSHF are companies that offer pre-settlement lawsuit funding. Whitehaven is a New York limited liability company. Defendant Nokley resides in Nevada and defendant PSHF is a Nevada foreign corporation.

Nokley formerly worked at The Legal Funding Group ("Legal Funding"). Plaintiff contends that sometime prior to April 2004, Nokley, through Legal Funding, referred David

Kingsbury ("Kingsbury"), now deceased, to Whitehaven for pre-settlement funding.

Kingsbury was a personal injury claimant who resided in Washington. Whitehaven paid a broker fee to Legal Funding for the Kingsbury referral. In April, May and September 2004, Whitehaven entered into three separate funding agreements with Kingsbury.

In May 2004, Nokley left Legal Funding and formed PSHF, which also offers pre-settlement lawsuit funding. Whitehaven contends that at a time when defendants knew Whitehaven had already funded Kingsbury, they entered into four separate pre-settlement funding agreements with Kingsbury, in June 2004, October 2004, January 2005 and September 2005. Kingsbury thereafter breached his contracts with Whitehaven. For its cause of action, Plaintiff asserts that defendants tortiously interfered with the Kingsbury contracts because defendants knew that "subsequent funding from another funding company to a particular personal injury claimant/litigant severely jeopardizes the ability of the original funding company to recoup... its investment."

Defendants now move to dismiss the complaint on jurisdictional grounds. Defendants contend there is no jurisdiction pursuant to either CPLR 301 or CPLR 302. Defendants argue that as nonresidents and because defendants merely maintain a website and an "800 phone number," there is no basis for jurisdiction. Defendants maintain that they have not transacted business in New York, the Kingsbury Referral was "not consummated in New York" and that plaintiff and defendants did not discuss any aspect of the Kingsbury contract in New York, but rather via telephone and/or internet.

Defendants also state they do not "do business in New York", "avail themselves to the laws, protections, and/or jurisdiction" of New York, "have no minimum contacts with New York as they do not advertise in New York," do not "maintain an office in New York, or reside in New York." Defendants also refer to an alleged settlement between the Estate of

Kingsbury and plaintiff in its reply papers to plaintiff's opposition, suggesting that "plaintiff's cause of action should fail because the underlying claim ... has been settled and ... is now deemed moot." In support thereof, defendants provide a letter dated February 12, 2007, from plaintiff's attorney, which offered to settle the instant action and indicated that plaintiff settled its claims with the Estate of Kingsbury.

Defendants separately claim no personal jurisdiction because the Summons and Complaint were only served on defendant Nokley, at his home address, and that defendant PSHF was never served.

Plaintiff opposes the motion and cross moves for costs and sanctions. Specifically, plaintiff argues that defendants: (1) regularly do and solicit business in New York; (2) engage in other persistent courses of conduct; (3) derive substantial revenue from services rendered in New York; and (4) expected or should have reasonably expected their acts to have consequences in the state and derived substantial revenue from interstate or international commerce.

In support, plaintiff has provided the affidavit of McMEnamin, and the affidavit of Mitchell Silbowitz ("Silbowitz"), Vice President of Whitehaven, along with emails and letters by or between themselves and defendants. Whitehaven contends that defendants have significant business ties to New York State. Whitehaven states that defendants have referred hundreds of cases to Whitehaven, upon which defendants earned substantial commissions. Whitehaven has also provided evidence of several business trips made by Nokley, wherein plaintiff argues that Nokley unequivocally solicited, proposed and engaged in business with Whitehaven. Plaintiff also contends that the defendants regularly do and solicit business from other New York entities.

With respect to subject matter jurisdiction, plaintiff states that both Nokley and

PSHF were served pursuant to the CPLR and BCL, within 120 days of commencement of this action. Plaintiff has provided such proof of service.

With respect to its motion for costs and sanctions against defendants, plaintiff claims that defendants' motion is frivolous for its "deliberate attempt to obfuscate and hide material facts" and that "[s]uch conduct should not be tolerated by this or any court."

### Discussion

Due process standards by which the court must be guided in determining whether a non-resident defendant is amenable to suit under a long-arm statute, require that the defendant have "minimum contacts" with the forum state, such that the action not offend "traditional notions of fair play and substantial justice." Murdock v. Arenson Intern. USA, Inc., 157 A.D.2d 110 (1<sup>st</sup> Dept. 1990). The New York State Court of Appeals has ruled that the purpose of CPLR 302 was to extend New York jurisdiction to nonresidents who have engaged in some purposeful activity in New York in connection with the cause of action asserted. Parke-Bernet Galleries Inc. v. Franklyn, 26 N.Y.2d 13 (1970).

Under CPLR 302(a)(3), New York courts may exercise jurisdiction over a nonresident defendant who commits a tortious act, other than defamation, outside the state causing injury to persons or property within the state if the defendant also:

(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... "

To establish that a defendant "does or solicits business" in New York, it must be shown that his "overall contact with New York is substantial enough to make it reasonable to

subject him to jurisdiction and feasible for him to defend here.” Murdock, *supra*.

It is undisputed that defendants are not domiciled in New York. Plaintiffs assert that defendants are subject to New York long-arm jurisdiction under CPLR 302(a)(3). It is also undisputed that the gravamen of the complaint is that defendants committed a tort outside New York which caused an injury in New York.

Defendants argue they are not subject to New York jurisdiction because plaintiff's only contact with the Nevada defendants was by telephone and/or internet. Defendants argument is belied by the record. Plaintiff states that they met with Nokley and other agents of PSHF many times and Nokley unequivocally suggested and scheduled face-to-face meetings with plaintiff. On February 16, 2007, Nokley said “I want to send Mike up to meet with you next week... he represents my interest and we have the same goals.” In an email dated March 10, 2006, Nokley wrote the following to Silbowitz:

“[c]an you guys look at this and tell me if you have any interest? If so I will run down the rest of the docs. Also, going to be in town next week Thursday afternoon and Friday with my business associate Mike Sciacchetano - Can we set a meeting time?”

Even if, as defendants contend, they only contacted plaintiff through telephone and/or internet, this would be sufficient for the court to exercise jurisdiction over these defendants. The requisite contacts may take place by phone, mail or electronic means; physical presence in the state is not required. Deutsche Bank Securities, Inc. v. Montana Board of Investments, 7 N.Y.3d 65 (2006).

Defendants argue that since the Kingsbury Referral took place in Nevada, they have not transacted business in New York. Plaintiff contends that defendants regularly solicited and did business with plaintiff. Plaintiff states that after PSHF came into existence, Nokley would meet with officers in Whitehaven's New York office “to discuss, propose and solicit

business opportunities,” including “attorney financing, health care financing, pre settlement financing and other matters.”

Silbowitz further states that PSHF and Whitehaven did substantial business together. In support, plaintiff has provided many emails from Nokley to plaintiff. In an email dated August 9, 2004, Nokley wrote “[k]eep the rejects coming I am all caught up.” According to plaintiff, Nokley was referring to cases plaintiff decided not to fund but instead referred to defendants for funding. Later in the same email, Nokley stated:

“I sent you one check and will have another for you when I return. I need to propose that if I broker the funding I still pay you half my commission (front- and if I fund in house I will not pay you any front commission but a 1/3 of the net of the back. Is this acceptable?

...

“Jack would you be interested in a possible position to allow me to be your phone center for all of your west coast advertising?”

On September 15, 2005, defendant Nokley wrote: “[p]lease make sure you show on your records that you’re paying Pre-Settlement Healthcare Funding, LLC and not me personally.” In an email dated June 17, 2006, Nokley said: “I really want... an exclusive deal with you. We seriously can put \$5m on the street this year if someone like you jumps on board.” On May 22, 2006, Nokley wrote: “If you... have a pulse call me... I have the PI deal of the year.”

Defendant also states that their contracts specifically state that any disputes arising therefrom will be resolved in Nevada pursuant to the laws of Nevada. However, there is no written contract by and between the parties to this action. Defendants have merely provided a blank contract which is wholly irrelevant to this action. This is not a breach of contract action, it is based on a tort.

Accordingly, the court finds that defendants did and solicited business in New York. The defendants' contacts with New York were substantial enough to make it reasonable to subject them to New York jurisdiction. Furthermore, defendants have not argued that they cannot feasibly defend this action, nor offered any evidence to support such a conclusion.

Because the court finds there is long-arm jurisdiction over defendants in New York under CPLR 302(a)(3)(i), the court does not reach the issue of whether there is jurisdiction pursuant to CPLR 302(a)(3)(ii).

Defendants contend that service on PSHF was not properly effectuated because "plaintiff failed to serve the Secretary of State or send a copy of the Complaint by registered mail."

It is well settled that the plaintiff has the burden of proving, by a preponderance of the credible evidence, that service was properly made. Persaud v. Teaneck Nursing Center, Inc., 290 A.D.2d 350 (1 Dept. 2002). Strict compliance with all the technical service requirements of the CPLR 311 is required in order to obtain jurisdiction over the defendant. Persaud, *supra*. However, a properly executed affidavit of service raises a presumption that a proper mailing occurred; mere denial of receipt is insufficient to rebut this presumption. Kihl v. Pfeffer, 94 N.Y.2d 118 (1999).

Plaintiff has provided affidavits of service attesting that it served the Summons and Complaint on PSHF, "by delivering to and leaving with Robert Nokely," trustee of the corporation, at the address listed on PSHF's. Plaintiff also has sworn that it personally served the Summons and Complaint on the Secretary of State pursuant to the BCL, and the Department of State's certification of service indicates that PSHC was served via certified mail, return receipt requested, at the same address as above. The court finds that the plaintiff properly served PSHF, pursuant to the CPLR and BCL 306.

Defendants also argue that service was improper because Nokley received a copy of the Summons and Complaint at his home in Las Vegas, Nevada. This argument is without merit, as CPLR 313 and 308(1) provide that service upon a natural person may be made by delivering the summons to the person to be served. Accordingly, defendants' motion to dismiss for lack of jurisdiction for failure to serve the Summons and Complaint is hereby denied.

In its reply papers, defendants raise issue for the first time about an alleged settlement between the Estate of Kingsbury and the plaintiff. However, the issue of the impact of the settlement, if any, is not before the court. The court does not rule with respect thereto. Accordingly, the motion to dismiss is hereby denied in all respects.

The cross motion for costs and sanctions is hereby denied in all respects. While defendants have not prevailed, the court does not find the legal arguments made by them to be frivolous within the meaning of the rule permitting sanctions, 22 NYCRR 130. Parks v. Leahey & Johnson, P.C., 81 N.Y.2d 161 (1993).

Defendant shall serve his answer within twenty (20) from the date of this decision and order. Plaintiff may reply within the time provided by the CPLR.

**This matter is hereby scheduled for a preliminary conference on June 7, 2007 at 9:30 a.m. In Part 10, 80 Centre Street, Room 122.**

This shall constitute the decision and order of the Court.

Dated: New York, New York  
April 20, 2007

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.

**FILED**  
APR 24 2007  
NEW YORK  
COUNTY CLERK'S OFFICE