

**KDDI America, Inc. v Electronic & Unit Recorder
Data Ctr., Inc.**

2007 NY Slip Op 32648(U)

August 15, 2007

Supreme Court, New York County

Docket Number: 0116005/2006

Judge: Richard B. Lowe

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

HON. RICHARD B. LOWE, III

PRESENT: _____

PART 56

Index Number : 116005/2006 *Justice*

KDDI AMERICA

vs

ELELCTRONIC & UNIT RECORDER

Sequence Number : 005

DISMISS

INDEX NO. _____

MOTION DATE 4/17/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____

motion to/for _____

PAPERS NUMBERED

Notice of Motlon/ 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

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


MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED

AUG 23 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: 8/15/07

HON. RICHARD B. LOWE, III 

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST _____

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

-----X
KDDI AMERICA, INC.,

Plaintiff,

-against-

ELECTRONIC AND UNIT RECORDER DATA
CENTER, INC., D/B/A EUR SYSTEMS, INTEC
USA, INC., INTEC BILLING SERVICES, INC.,
SARATOGA PARTNERS, L.P., JOHN E. BOYD,
CHARLES B. ACHUFF, JR.; RAYMOND L.
WENGER, and JAMES MALAWSKEY,

Index No. 116005/06

Defendants.

-----X
RICHARD B. LOWE, III, J.:

FILED
AUG 23 2007
NEW YORK
COUNTY CLERK'S OFFICE

In a single motion, defendants Charles B. Achuff, Jr. (Achuff), James Malawskey (Malawskey) and Raymond L. Wenger (Wenger) move to dismiss the complaint, pursuant to CPLR 3211 (a) (1) and (7), based upon documentary evidence for failure to state a claim; defendant John E. Boyd (Boyd) moves for an order granting summary judgment and dismissing the complaint as to him pursuant to CPLR 3211 (a) (7) and 3212; and defendants Achuff and Wenger move to dismiss the complaint, pursuant to CPLR 3211 (a) (8), based upon lack of personal jurisdiction.

Plaintiff KDDI America, Inc. (KDDI) is an international telecommunications company. In May 2006, KDDI allegedly entered into a business process outsourcing services agreement with defendant Electronic and Unit Recorder Data Center, Inc., d/b/a/ EUR Systems (EUR), a Pennsylvania corporation, pursuant to which EUR agreed to establish and operate a centralized billing system and support services for KDDI's planned mobile telecommunications services for KDDI's Japanese customers, to be launched on October 1, 2006.

KDDI further alleges that at the time that it entered the agreement with EUR, EUR and the other defendants were negotiating the sale of EUR's business to defendant Intec USA and Intec Billing Services, Inc. (together, Intec). According to KDDI, in July 2006, EUR and Intec entered into an asset purchase agreement, pursuant to which EUR agreed to sell its business and assets to Intec for approximately \$13.5 million. Under the agreement, Intec would assume some, but not all liabilities of EUR (the EUR-KDDI agreement being one of the liabilities not included).

KDDI alleges that it paid a total of \$443,291.84 to EUR in connection with the services agreement, \$166,124.18 of which it paid to EUR in August 2006, at EUR's behest, after EUR had entered into the asset purchase agreement with Intec. KDDI further alleges that since the asset sale, EUR and Intec have provided none of the services for which KDDI contracted.

KDDI asserts a total of 11 causes of action, the majority of which are asserted against EUR and Intec, including but not limited to breach of contract, conversion, fraudulent transfer, and breach of Pennsylvania unfair trade practices and consumer protection laws. KDDI's claims against EUR and Intec have been sent to arbitration.

In addition, KDDI asserts a cause of action for breach of fiduciary duty and/or illegal distribution of assets against the individual defendants, and a cause of action for civil conspiracy against all of the defendants.

With respect to the individual defendants, KDDI alleges the following:

Boyd has a principal office in Mechanicsburg, Pennsylvania, and at all relevant times was the president, chief executive officer and a director of EUR;

Achuff resides in Mechanicsburg, Pennsylvania, and was the chief operating officer and a

director of EUR until the sale of EUR's assets to Intec, and since that time has been an employee of Intec;

Wenger has a principal office in Mechanicsburg, Pennsylvania, and at all relevant times was the Secretary, Treasurer, Chief Financial Officer and a director of EUR;

Malawskey resides in Mechanicsburg, Pennsylvania, and on information and belief was Director, Account Management until the sale of EUR's assets and business to Intec, and since that time has been an employee of Intec.

With respect to substantive allegations against the individual defendants, the complaint alleges that on July 5 and 6, 2006, Malawskey contacted KDDI to demand that KDDI make an additional payment of \$162,000, though it was not required under the Services Agreement, and that Malawskey represented that EUR was committed to the success of the project. The complaint further alleges that on July 18, 2006, Malawskey informed KDDI of the agreement regarding the EUR-Intec sale, without disclosing that EUR would not be able to perform its obligations to KDDI under the EUR-KDDI agreement.

The complaint alleges that at the direction of Boyd, Achuff and Wenger, EUR distributed the net proceeds of the EUR-Intec sale to Saratoga, the sole equity holder of EUR, leaving EUR with no assets with which to pay its creditors.

Claiming breach of fiduciary duty and/or illegal distribution, the complaint alleges that Boyd, Achuff, Wenger, and Malawskey were directors and/or officers of EUR, and that they structured and orchestrated the EUR-Intec sale in a manner that prevented EUR from performing its obligations to KDDI, and that they made the distribution to Saratoga of the net assets of the proceeds of the sale of EUR to Intec, even though EUR became insolvent, in violation of 15 Pa

Cons Stat § 1551 (b), governing corporate distributions.

Finally, the complaint alleges that all of the defendants conspired together to induce KDDI to enter and perform under the Services Agreement, and colluded to induce KDDI to make payments under the agreement, though they knew that EUR would not perform under the agreement.

Achuff submits an affidavit stating that he is presently vice-president of Intec Outsourcing Services, and was the Chief Operating Officer of EUR, but was not a director of EUR. Achuff further states that, though he has traveled to New York for personal or business reasons a few times a year, he does not routinely solicit or transact business in New York or obtain revenue from the sale of goods or rendering services in New York or receive revenue from interstate or international commerce. Achuff states that he was not involved in the solicitation, negotiation, or execution of the KDDI-EUR agreement, though he undertook responsibility for overseeing EUR's performance under the agreement when the former executive overseeing the agreement left EUR on August 15, 2006. Achuff states that his only activity in New York in connection with the agreement was his participation in one meeting, on or about August 28, 2006, when he visited KDDI's New York office, at KDDI's request, to discuss delays in completing the project. Achuff states that he did communicate, from Pennsylvania, with KDDI representatives over the telephone or by electronic mail or other means.

Achuff states that his main role with respect to the asset sale from EUR to Intec was to provide information to EUR regarding Intec, and that he was not actively involved in the negotiation of terms or structure of the agreement. He did, at the direction of the board of directors, execute the closing documents on behalf of EUR. Finally, Achuff states that he had no

role in directing the disposition of the proceeds of the asset sale and had no involvement in the decision to exclude the KDDI-EUR agreement from the liabilities that Intec would assume.

Malawskey submits an affidavit stating that prior to September 2006, he was employed by EUR and is currently Project Manager with Intec Outsourcing Services and was neither a director nor an officer of EUR. Malawskey states that he had no involvement in the asset sale from EUR to Intec and had no role in directing the disposing of the sale proceeds nor in the decision to exclude the KDDI-EUR agreement from the liabilities assumed by Intec.

Wenger submits an affidavit stating that, prior to September 2006, he was Secretary and Treasurer of EUR and was subsequently employed by Intec USA, Inc., until November 30, 2006. Wenger states that he was not a director of EUR.

Wenger states that although he travels to New York for personal or business reasons a few times a year, he does not routinely solicit or transact business or obtain revenue from the sale of goods or rendering services in New York, does not engage in any regular activities in New York, or receive revenue from interstate or international commerce.

Wenger further states that he was not involved in the solicitation, negotiation, or execution of the KDDI-EUR agreement, and did not conduct any activities in New York in connection with the agreement, and never met or communicated with KDDI representatives. He states that his main role in the EUR-Intec asset sale was to provide financial information about EUR to Intec in connection with Intec's due diligence review. He made pre- and post-closing determinations of financial data, and is still involved in making such determinations under the asset purchase agreement, but was not actively involved in negotiating the terms or structure of the asset purchase agreement, nor did he execute the agreement on behalf of EUR or have any

role in determining the disposition of the sale proceeds or deciding that the KDDI-EUR agreement would be excluded from the liabilities that Intec would assume.

Wenger states that, as treasurer of EUR, it would be his responsibility to initiate payments to Saratoga Partners and that no payment of sale proceeds has been made to Saratoga, that he is knowledgeable about the escrow account set up pursuant to the EUR-Intec agreement, and that the only disbursements from that account have been made to Intec.

According to Wenger, at the time of the asset sale to Intec, EUR owed approximately \$48.1 million in principal (plus another \$7.2 million interest) to a consortium of lenders led by the Bank of Montreal (the lenders), and that the entire debt was secured by a lien on EUR's assets.

Finally, Wenger states that, as Secretary of EUR, it was his responsibility to maintain records of all actions taken by the board of directors, and he attaches, among other items, the Closing Statement related to the EUR-Intec asset sale, indicating the disposition of proceeds from the sale and a copy of the consent to sale of assets by the Bank of Montreal on behalf of the lenders.

Boyd submits an affidavit stating that he was president, Chief Executive Officer and a director of EUR until August 31, 2006, and that on that date he ceased being an employee, officer, or director of EUR, and was no longer affiliated with EUR at the time of the closing of the asset sale to Intec, and had no role in the disposition of proceeds from that sale except, insofar as provided in the agreement, which he approved as a director in July 2006.

Plaintiff does not submit any evidence in response to the affidavits and exhibits submitted by defendants, but rather, continues to assert, on the basis of the unverified complaint,

that all of the individual defendants were directors of EUR, in the face of the express denials of defendants Achuff, Malawskey and Wenger.

PERSONAL JURISDICTION

Defendants Achuff and Wenger move to dismiss on the ground of lack of personal jurisdiction. As a preliminary matter, plaintiff contends that the defense of personal jurisdiction has been waived, because Achuff and Wenger appeared in this action in connection with prior motion practice regarding arbitration of the claims against EUR and Intec. Quoting *Skyline Agency v Coppotelli, Inc.* (117 AD2d 135, 140 [2d Dept 1986]), plaintiff states that "[a]n appearance by a defendant in an action is deemed to be the equivalent of personal service of a summons upon him, and therefore confers personal jurisdiction over him." As defendants note, however, the quote in *Skyline Agency* continues with the qualification, "unless he asserts an objection to jurisdiction either by way of motion or in his answer." *Id.* (citations omitted). Here, of course, Achuff and Wenger have moved to dismiss based, in part, on a lack of personal jurisdiction. Thus, the court need not determine whether their involvement prior to this motion constitutes the type of substantial activity which would result in a waiver of the defense of lack of personal jurisdiction. See *Parrotta v Wolgin*, 245 AD2d 872, 873 (3d Dept 1997)("where ... the substantial activity which constitutes the appearance occurs before the defendant's time to answer expires, it does not deprive him of the right to object to jurisdiction")(internal quotation marks and citations omitted); see also *Becker v Lesnick*, 96 Misc 2d 819 (Sup Ct, NY County 1978).

Personal Jurisdiction may be asserted against a non-resident 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; or

2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or

3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, 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.

CPLR 302 (a).

It is uncontested that neither defendant was served with process in New York, and neither resides in New York or own or possesses property in New York; thus, plaintiff asserts personal jurisdiction over defendants Wenger and Achuff pursuant to CPLR 302 (a) (3), and over Achuff pursuant to CPLR 302 (a) (1) and (2).

CPLR 302 (a) (3):

To establish jurisdiction under CPLR 302 (a) (3), the non-resident defendants must have committed a tort outside of New York that caused an injury in New York. That injury, however, must be a more direct injury in New York than "indirect financial loss to resulting from the fact that the injured person resides or is domiciled there." *Fantis Foods, Inc. v Standard Importing Co.*, 49 NY2d 317, 326 (1980). Here, even assuming that a tort was committed by these defendants, plaintiff has not shown any injury in this state, other than indirect financial injury.

Furthermore, not only must the defendants have committed a tortious act outside of New

York which causes injury in New York, they must regularly do or solicit business in New York, and derive substantial revenue from their New York activities, or should expect their acts to have consequences in the state and derive substantial revenue from interstate or international commerce.

Citing *Siegel v Holson Co.* (768 F Supp 444 [SD NY 1991]), defendants argue that to the extent that EUR derived revenue from rendering services in New York, that revenue cannot be imputed to Wenger or Achuff for the purposes of obtaining jurisdiction pursuant to CPLR 302 (a) (3). Plaintiff argues that *Siegel* is distinguishable because there, the Court reached its conclusion because the defendant there was a non-shareholder officer of the corporation. Plaintiff notes that the *Siegel* court distinguished *Fact, Inc. v Krueger, Inc.* (732 F Supp 1267 [SD NY 1990]) where officers of a corporation who were major shareholders of the company for whom they were employed were subjected to personal jurisdiction in part based upon the activities of the corporation. In its Memorandum of Law, plaintiff then states, upon information and belief, that EUR is a closely held corporation, and that its officers and directors held some form of an equity interest in EUR.

Considering Wenger first, Wenger states that although he travels to New York for personal or business reasons a few times a year, he does not routinely solicit or transact business or obtain revenue from the sale of goods or rendering services in New York, does not engage in any regular activities in New York, or receive revenue from interstate or international commerce.

Wenger further states that he was not involved in the solicitation, negotiation, or execution of the KDDI-EUR agreement and did not conduct any activities in New York in

connection with the agreement, and never met or communicated with KDDI representatives.

On reply, Wenger states, under oath, that he owns no stock in EUR. Plaintiff does not provide evidence to contest this or any of Wenger's other sworn factual assertions about himself. Given Wenger's sworn denials that he is a director or shareholder of EUR, it is not appropriate to impute EUR's interstate or international revenues to Wenger.

The burden of proving jurisdiction is on the party asserting it. *Roldan v Dexter Folder Co.*, 178 AD2d 589, 590 (2d Dept 1991). With respect to Wenger, plaintiff has failed to establish a basis on which to find long-arm jurisdiction pursuant to CPLR 302 (a) (3). Since no other source of jurisdiction is alleged as to him, his motion to dismiss is granted.

With respect to Achuff, he states under oath that he does not routinely solicit or transact business in New York or obtain revenue from the sale of goods or rendering services in New York or receive revenue from interstate or international commerce. As to whether Achuff is a major shareholder in EUR, and therefore EUR's revenue could be imputed to him, Wenger states under oath that, as Secretary of EUR, he has knowledge of the records concerning shareholders of EUR, and that Achuff indirectly owns "an infinitesimal percentage of EUR stock." Wenger Reply Aff., ¶ 4.¹ The information and belief allegation of plaintiff's counsel (the allegation is not even contained in the complaint) is insufficient to overcome Wenger's sworn statements concerning the ownership of EUR stock. Thus, given that

¹ According to Wegner, the outstanding shares of EUR stock, by class, are as follows: Series A Preferred 45,000, Class A Common 9,889, and Class B Common 1,505. 9,296 shares of the Class A Common Stock are owned by EUR Holdings Corporation (Holdings), which also owns all of the Class B Common Stock. The outstanding shares of Holdings, by class, are: Series A Preferred 503, Class A Common 43,872 and Class B Common 6,708. Wegner states that Achuff owns 235 of the 43,872 shares of Class A Common stock and 477 shares of the 6,708 Class B Common stock.

there is no evidence that Achuff is a major shareholder of EUR, and Achuff's sworn denial that he is a director of EUR, it is not appropriate to impute EUR's revenues to Achuff for the purposes of personal jurisdiction.

For these reasons, there is no jurisdiction over Achuff based on 302 (a) (3).

CPLR 302 (a) (1) and (2):

Plaintiff also asserts jurisdiction over Achuff pursuant to CPLR 302 (a) (1) and (2). Plaintiff contends that Achuff's own affidavit shows that he had contacts with KDDI in New York via e-mail and telephone and participated in a meeting with KDDI in New York sufficient to establish jurisdiction pursuant to both subsections (1) and (2). It is not possible to determine from Achuff's affidavit the extent of his e-mail and telephone communication with KDDI in New York, or the significance of the August 28, 2006 meeting in New York with KDDI. Achuff does state that, at the meeting, delays in completing the project were discussed. Achuff states that he had no involvement in procuring or negotiating the KDDI-EUR agreement, and undertook responsibility for overseeing EUR's performance under the agreement only when the former executive overseeing the agreement left EUR on August 15, 2006. Contacts through telephone calls and mail (electronic or otherwise) are not usually sufficient to confer personal jurisdiction (*see Marie v Altshuler*, 30 AD3d 271, 272 [1st Dept 2006]); *Kahn Lucas Lancaster, Inc. v Lark Intl. Ltd.*, 956 F Supp 1131, 1135 [SD NY 1997].

Achuff did participate in one meeting in New York regarding EUR's performance of the agreement, which he oversaw. In *George Reiner and Co., Inc. v Schwartz* (41 NY2d 648 [1977]), attending one meeting in New York was considered a sufficient basis for personal jurisdiction. However, there the defendant came to New York to be interviewed and enter into

an employment agreement which contemplated and resulted in a continuing personal employment relationship, and under which agreement the defendant was sued. In a detailed examination of cases both establishing and rejecting jurisdiction under CPLR 302 (a) (1), the Court in *Kahn* concluded that even six meetings between the parties over three years were insufficient to confer personal jurisdiction where the meetings were not essential to the continuance or development of the relationship. Here, the one meeting in which Achuff participated in New York related to EUR's delays in performance of the agreement, which had already been entered into by the parties several months before, and was not the basis for a personal relationship between Achuff and KDDI.

Achuff having described his limited contacts with KDDI in New York, it is incumbent on the plaintiff to come forward with evidence to support the existence of sufficiently significant contacts to justify the exercise of jurisdiction under CPLR 302 (a) (1). *See Roldan v Dexter Folder Co.*, 178 AD2d at 590. This is particularly true because as the court stated in *Kahn*, "the New York Court of Appeals has cautioned that 'we should not forget that defendants, as a rule, should be subject to suit where they are normally found, that is, at their pre-eminent headquarters or where they conduct substantial general business activities.'" *Kahn Lucas Lancaster, Inc. v Lark Intl. Ltd.*, 956 F Supp at 1135, quoting *McKee Elec. Co. v Rauland-Borg Corp.*, 20 NY2d 377, 382 (1967). The court therefore concludes that plaintiff has failed to establish jurisdiction over Achuff pursuant to CPLR 302 (a) (1).

To establish jurisdiction pursuant to CPLR 302 (a) (2), plaintiff must allege that the defendant committed a tortious act within the state of New York. Plaintiff alleges two substantive causes of action against Achuff and the other individual defendants. The first of the

two is Count X, breach of fiduciary duty and/or illegal distribution. With respect to the claim of illegal distribution, plaintiff alleges that the individual defendants, including Achuff, improperly distributed the proceeds of the sale of EUR to Intec to Saratoga. Even assuming that occurred, which Wenger asserts it did not, that action would have occurred in Pennsylvania, not New York, and thus would not constitute a tortious action in New York. Similarly, structuring and orchestrating the EUR-Intec sale in a manner that prevented EUR from performing its obligations to KDDI, if it occurred, would also have occurred in Pennsylvania and not New York. Therefore, the allegations in Count X can not form the basis for personal jurisdiction pursuant to CPLR 302 (a) (2).

In Count XI, plaintiff alleges that all of the defendants conspired to induce KDDI to enter into and perform the services agreement with the knowledge that EUR would not perform the agreement. KDDI further alleges that having induced KDDI to enter the agreement, the defendants colluded to have KDDI make payments, in the amount of \$433,291.84, under the agreement, which they knew that EUR would not perform, and that defendants have wrongfully withheld those payments from KDDI. Again, given Achuff's sworn statement that his involvement with the EUR-KDDI agreement began in August 2006, there is no basis for allegations that he committed a tortious act in New York as part of a conspiracy to induce KDDI to enter into the agreement with EUR. The possible remaining basis for jurisdiction is the portion of the cause of action alleging that the defendants colluded to have KDDI make payments to EUR knowing that EUR would not perform under the agreement. However, the complaint alleges that Malawskey, not Achuff, "demanded" that KDDI make the \$162,000 payment. Nor does the complaint allege that the issue of payments even arose during Achuff's meeting in New

York. There are no specific allegations that any conduct of Achuff relating to the purported conspiracy actually occurred in New York. Therefore, if such a conspiracy occurred, and even assuming it would be actionable, there are no allegations that it occurred in New York, rather than Pennsylvania, where all of the defendants are located. Therefore, there is no basis for jurisdiction over Achuff pursuant to CPLR 302 (a) (2), and his motion to dismiss is granted.

MOTION TO DISMISS BASED ON DOCUMENTARY EVIDENCE

Claiming breach of fiduciary duty and/or illegal distribution, the complaint alleges that Boyd, Achuff, Wenger, and Malawskey were directors and/or officers of EUR, and that they structured and orchestrated the EUR-Intec sale in a manner that prevented EUR from performing its obligations to KDDI, and that they made the distribution to Saratoga of the net assets of the proceeds of the sale of EUR to Intec, even though EUR became insolvent, in violation of 15 Pa Cons Stat § 1551 (b), governing corporate distributions.

A motion to dismiss based on documentary evidence may be granted only "where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 (2002). Thus, for example, where an explicit clause in an integrated mortgage and mortgage note precluded an action for a personal judgment against the defendants on the mortgage note, an action by plaintiffs based on the mortgage note was properly dismissed. *Bronxville Knolls, Inc. v Webster Town Center Partnership*, 221 AD2d 248, 248 (1st Dept 1995).

Defendants contend, based on documentary evidence, that no distribution was ever made to Saratoga; therefore, there could have been no breach of fiduciary duty. In support of their contention, they rely on the affidavit of Wenger, who states that as treasurer of EUR, it would

have been his responsibility to make payments to Saratoga and that no such payments were made. Wenger Affidavit, ¶ 15. Wenger's sworn statement does not, however, constitute documentary evidence as contemplated by CPLR 3211 (a) (1). See Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10 (neither an affidavit nor a deposition can ordinarily qualify as documentary evidence).

Wenger also submits what he states is a true and correct copy of the Closing Statement for the asset purchase agreement between EUR and Intec, which indicates that \$14,831,417.15 resulting from the EUR-Intec agreement was disposed as follows:

Amount by and paid at the direction of Intec
 \$11,404,000.00: to the Sellers at a bank account established
 and maintained by the Bank of Montreal as
 Administration Agent for the Lenders

\$ 2,000,000.00: to the Escrow Agent

Amount by and paid at the direction of EUR
 \$ 1,361,000.00: to the Bank of Montreal as Administration Agent for the
 Lenders

\$ 66,417.15: to Intec representing cash received by EUR
 from Sept. 1, 2006 - Sept. 6, 2006 (exclusive of
 \$194,106.16 due to EUR from IBM pursuant to the May 31, 2006 invoice
 (No. 102458) which if received by EUR shall be retained by EUR.

Wenger Affidavit, Exh. C.

Even this document, however, requires interpretation based on statements contained in Wenger's affidavit, including the extent of EUR's indebtedness to the Lenders, the fact that the Escrow Agent did not turn any of the \$2,000,000 over to Saratoga, and that none of the \$194,106.16 due to EUR from IBM was received by EUR and then paid to Saratoga.

Although plaintiff may not be able to establish at trial that the funds obtained from the

EUR-Intec sale were distributed to Saratoga, defendants' motion to dismiss based upon documentary evidence must be denied.

In addition, citing *Travelers Cas. & Surety Co. v Irex Corp.* (2002 WL 32351176, at *3 [ED Pa, 2002]), defendants contend that the directors of a company owe fiduciary duties only to the company itself and its shareholders, and that only when a company becomes insolvent may those duties expand to creditors as a class. Here, of course, plaintiff alleges that EUR no longer has funds to carry out its obligations under the EUR-KDDI agreement or to reimburse KDDI for the payments it made to EUR pursuant to the agreement, having improperly distributed its funds to Saratoga.

Defendants further contend that, in any case, officers have no such fiduciary duty, citing *In re National Forge Co.* (344 BR 340, 372-72 [WD Pa 2006]). Citing the affidavits of the respective defendants, defendants state that Malawskey never was a director or officer, and thus had no fiduciary duty to KDDI, and that though Achuff and Wenger were officers, they were not directors of EUR.

Plaintiff argues that under Pennsylvania law, officers as well as directors have a fiduciary duty to creditors. See *In re Logue Mechanical Contr. Corp v Logue*, 106 BR 436, 439 (Bankr WD Pa 1989), citing *In re Simplified Information Systems, Inc. v Cannon*, 89 BR 538 (WD Pa 1988)("Under Pennsylvania law, directors, officers and controlling shareholders stand in a fiduciary relationship to the corporation and stockholders and creditors of the Corporation").

Furthermore, when a motion to dismiss is based upon CPLR 3211 (a) (7), failure to state a cause of action, although affidavits may be used by a plaintiff to remedy inartfully drawn pleadings, defendants' affidavits do not normally warrant relief unless they conclusively establish

that the plaintiff has no cause of action and the court converts the motion to dismiss to one of summary judgment. *Rovello v Orofino Realty Co, Inc.*, 40 NY2d 633, 635-6 (1976). Here, the court has not converted defendants' motion to one for summary judgment; therefore, the factual assertions contained in defendants' affidavits are not properly considered on a CPLR 3211 (a) (7) motion. Thus, neither Achuff, Wenger or Malawskey's statements that they were not directors (and Malawskey was not an officer), nor their characterizations of the extent (or lack thereof) of their involvement in the decisions which are at the heart of the complaint may be considered by the court on the 3211 (a) (7) motion.²

Boyd, having answered, moves for summary judgment, pursuant to CPLR 3211 (a) (7) and 3212. Boyd states, under oath, that on August 31, 2006, he ceased being an employee, officer, or director of EUR, was no longer affiliated with EUR at the time of the asset sale to Intec, and, therefore, had no involvement in the distribution of EUR's assets. To the extent that Boyd brings his motion pursuant to CPLR 3212, his affidavit can be considered by the court. The plaintiff must, therefore, come forward with some evidence that raises a question of fact about when Boyd ceased his involvement with EUR, or whether he was involved in decisions regarding the distribution of EUR's assets prior to his separation from the company, to sustain its allegations that Boyd was involved with the improper distribution of EUR's assets after its sale to Intec. It has not done so, and therefore, Count X is dismissed as to Boyd, to the extent that it alleges a breach of fiduciary duty with respect to the distribution of EUR's assets. However, Count X also alleges that defendants breached their fiduciary duty by the manner in which the

² The complaint is, however, dismissed as to Achuff and Wenger for lack of personal jurisdiction.

EUR-Intec sale was structured. Boyd has not submitted evidence which overcomes those allegations as a matter of law. Therefore, his motion is denied with respect to that aspect of Count X.

CAUSE OF ACTION FOR CIVIL CONSPIRACY

Defendants move to dismiss Count XI of the complaint which alleges that all of the defendants conspired together to induce KDDI to enter into an agreement with, and make payments to EUR, although they knew that EUR would not perform under that agreement. Defendants first argue that there is no substantive cause of action for civil conspiracy in New York. *See Steier v Schreiber*, 25 AD3d 519, 522 (1st Dept 2006). Citing *Skipworth by Williams v Lead Indus. Assn., Inc.* (547 Pa 224, 235, 690 A2d 169, 174 [1997], quoting *Thompson Coal Co. v Pike Coal Co.*, 488 Pa 198, 412 A2d 466 [1979]), plaintiff argues that under Pennsylvania law, there is an independent cause of action for civil conspiracy, and that under the "interests analysis" of conflict of laws, that Pennsylvania, rather than New York law should be applied. *See Schultz v Boy Scouts of America, Inc.*, 65 NY2d 189, 196 (1985). In making that determination, the court should identify "the significant contacts and the jurisdiction in which they are located ... [and] 'next determine whether the purpose of the laws is to regulate conduct or allocate loss.'" *DeMasi v Rogers*, 34 AD3d 720, 720 (2d Dept 2006)(citation omitted). Where the law involves "the appropriate standard of conduct, the law of the place of the tort will generally apply." *Id.*

Here the parties are domiciled in different states. The defendants are domiciled in Pennsylvania, and the alleged conduct (the conspiracy) took place in the state where the defendants are domiciled. Thus, the place of the tort was Pennsylvania. At most, one of the

individual defendants attended one meeting with the plaintiff in New York. Given these facts, the court concludes that the law of Pennsylvania, not New York should apply.

Defendants contend that the cause of action should nonetheless be dismissed because it is merely duplicative of the breach of contract cause of action. Here, however, the individual defendants are not named in the breach of contract cause of action which is limited to defendant EUR. Defendants' motion to dismiss based on the duplicative nature of the cause of action is denied.

Accordingly, it is hereby

ORDERED that the motion to dismiss for lack of personal jurisdiction by defendants Achuff and Wenger is granted and the complaint is severed and dismissed as to those defendants with costs and disbursements to them as taxed by the Clerk of the Court on submission of an appropriate bill of costs; and it is further

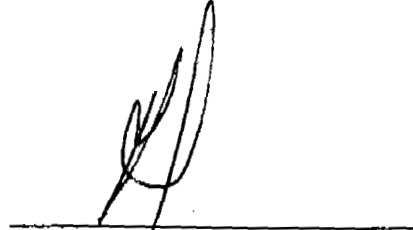
ORDERED that the Clerk is directed to enter judgment as to them accordingly; and it is further

ORDERED that the motion to dismiss of defendants Achuff, Wenger and Malawsky is otherwise denied; and it is further

ORDERED that Boyd's motion for summary judgment is denied.

Dated: August 15, 2007

ENTER:



HON. RICHARD S. LOWE, III

FILED

AUG 23 2007

NEW YORK
COUNTY CLERK'S OFFICE