SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x TRIAL TERM PART: 48

WALDEMAR FERNANDEZ,

INDEX NO.:18608/07

Plaintiff,

MOTION DATE:12-21-07
-against- SUBMIT DATE:12-21-07
SEQ. NUMBER - 001

WEBSINGULARITY, INC. F/K/A JJAG, INC.,
KENNETH L. GAVRANOVIC,

Defendant,

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The following papers have been read on these motions:

Notice of Motion, dated 11-19-07.....1
Affidavit in Opposition, dated 12-3-07.....2
Memorandum of Law In Opposition, dated 12-3-07.....3
Defendant's Reply Memorandum, dated 12-19-07.....4
Plaintiff's Letter, dated 12-26-07.....5

Defendant's motion to dismiss this action pursuant to CPLR §3211(a)(8), for lack of personal jurisdiction is granted and the action is dismissed.

Plaintiff sues to recover approximately $320,000.00 which he invested to become a shareholder in the corporate defendant (WI) a Delaware corporation doing business in Georgia. The individual defendant also a Georgia resident is the chief executive officer and organizer of WI. Except for plaintiff, who claims to be a resident of New York, all of the other investors in WI are from Georgia.

The submissions disclose that plaintiff and Gavranovic, the individual defendant, had participated in a successful business venture prior to the events hereof and had thereafter remained in contact with each other, including an encounter in New York State in 2006 at which time Gavranovic mentioned his concept for a web based business.

A year later, Gavranovic by telephone advised plaintiff that he was forming WI and moving ahead with his web business concept. Plaintiff expressed interest in investing and promptly traveled to Georgia whereupon the parties agreed that plaintiff would invest $319,999.95 for what plaintiff believed would be one-third of the common stock of WI. Gavranovic e-mailed shareholder and subscription agreements to plaintiff in what plaintiff claims to be in New York (plaintiff's address is not disclosed but defendants do not dispute his claim of New York residency). Plaintiff signed and returned signature pages and wired the monies to Georgia. Defendants claim that fully signed documents were mailed back to plaintiff, not claimed at the post office but nevertheless that his shareholder status was recorded on the WI records and shares in his name were issued. Shortly thereafter, an e-mail dispute arose as a result of which plaintiff claims that Gavranovic offered and he accepted the return of his investment monies. This suit which contains two causes of action, one for monies had and received and a second claim that defendants breached an agreement to rescind the subscription and shareholder agreements, ensued.

The sole issue here is whether, on these facts, New York courts may claim jurisdiction over the defendants pursuant to either CPLR §302(a)(1) transaction of business within the State or CPLR §302(a)(2) commission of tortious conduct within the state.

Commission of tortious conduct is clearly and a contract to supply goods or services within the State are not applicable because the complaint does not allege any claims of tortious conduct, or supply of goods or services within the State or facts from which such causes of action might be said to exist. Thus, if jurisdiction is to be found, it must be based on CPLR §302(a)(1) transaction of business within the state.

New York's long-arm statute provides in relevant part, "a court may exercise personal jurisdiction over any non-domiciliary ... who in person or through an agent ... transacts any business within the state or contracts anywhere to supply goods or services in the state." CPLR §302(a)(1). Thus, to justify the exertion of personal jurisdiction over a defendant based on §302(a)(1), two conditions must be met first, the non-domiciliary must transact business within the state; second, the claim against the non-domiciliary must arise out of that business activity.

The first prong of §302(a)(1) requires that the non-domiciliary transacts business in New York. To transact business, a non-domiciliary must purposefully avail itself of the privilege of conducting activities within New York, thus invoking the benefits and protections of its laws. The factors a court considers to determine whether an out-of-state defendant transacts business in New York include: (1) the existence of an ongoing contractual relationship; (2) whether the contract was negotiated or executed in New York; (3) if there are any choice of law provisions in the contract; and (4) whether the contract requires payments into New York. Although all factors as relevant, no one factor is dispostive. Because a court must examine the totality of circumstances, other factors may also be considered.

The second prong of CPLR §302(a)(1) requires there to be a articulable nexus between the transacted business and the cause of action on which suit is brought. Thus, jurisdiction is not justified where the relationship between the claim and transaction is too attenuated.

In addition to satisfying the requirements of §302(a)(1), the exercise of jurisdiction must also satisfy due process. Due process requires that a defendant have enough minimum contacts with the forum state so that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. Due process is satisfied if the defendant purposely and sufficiently availed itself of the privileges of conducting business in New York, so that it would be reasonable to anticipate being subject to suit. *JFP Touring, LLC v. Polk Theatre Inc.*, 2007 WL 20405857 (SDNY [N.O.R.]) (Internal quotations and citations omitted). *See also Johnson v. Ward*, 4 N.Y. 3d 516, 520 (2005).

Although a single act or transaction might be sufficient to confer jurisdiction over a foreign defendant who never even physically enters the state the activities must be purposeful with a substantial relationship between the transaction and the claim, *Kreutter v. McFadden Oil Corp.*, 71 NY2d 460, 467 (1988).

While the ultimate burden of proof rests with the party asserting jurisdiction the plaintiff in opposition to a motion to dismiss based on CPLR 3211(a)(8) need only make a prima facie showing that the defendant was subject to the personal jurisdiction of the court. *Cornely v. Dynamic HVAC Supply, LLC*, 44 AD3d 986 (2d Dept. 2007), *Opticare Acquisition Corp. v. Castillo*, 25 AD3d 238, 243 (2d Dept. 2005).

In this case, plaintiff has failed to make a prima facie showing of sufficient activity on the part of defendants to justify the exercise of jurisdiction over them. The conversation during the visit to New York by Gavranovic in 2006 was tentative and dealt with an expectation of some future event. The telephone call that defendant was going ahead with his plans, was lacking in substantive content. The faxing of an agreement from out of state to New York and follow up telephone calls to New York on a contract to be performed out of state, have been held as not qualifying as purposeful activity. *International Customs Associates, Inc. v. Ford Motor Company*, 893 F. Supp 1251, 1261-1262 (S.D.N.Y. 1995); *Kimco Exchange Place Corp. v. Thomas Benz, Inc.*, 34 AD3d 433 (2d Dept. 2006). The agreements did not give rise to any substantial relationships with or in the state. *Opticare, supra* 243.

Here, the agreements were negotiated in the State of Georgia without benefit of any solicitation in New York. The meeting which took place in New York a year earlier was not a negotiation and was not for the purpose of forming a new business relationship. Sending the subscription and shareholder agreements into New York and follow up e-mails were ministerial. All of the other investors were from Georgia, the business was to be conducted from Georgia with no performance by the parties of any activity in New York. The e-mails into New York did not consist of substantive negotiations and the e-mails relied upon by the plaintiff to establish his claim of an agreement to rescind the contract took place after the original investment arrangement was consummated and even if creating a new contract to rescind the original transaction are not enough to constitute the transaction of business in New York.

In sum, the court finds that upon viewing the totality of the facts, the Court finds that there is no jurisdiction pursuant to CPLR §302. *Farkas v. Farkas*, 36 AD3d 852 (2d Dept. 2002); *Bill-Jay Machine Tool Corp v. Koster Industries, Inc.*, 29 AD3d 504 (2d Dept. 2006).

Although not requested, the Court has considered whether discovery pursuant to CPLR §3211(d) is appropriate and concludes that discovery under that provision is not necessary. To avail oneself of the benefits of CPLR §3211(d) it must be shown that facts essential to justify opposition to dismissal may exist but cannot then be stated. But there must be some tangible evidence which would constitute a sufficient start in showing that jurisdiction could exist. *Chen v. Shi*, 19 AD3d 407 (2d Dept. 2005), *Mandel v. Busch Entertainment Corp.*, 215 AD2d 455 (2d Dept. 1995). Here the facts necessary to determine this motion are uncomplicated and not in dispute, thus discovery is not appropriate.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: January 18, 2008

HON. DANIEL PALMIERI
Acting Supreme Court Justice

ENTERED
JAN 23 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE

TO: Deutsch & Lipner
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