

Terwin Advisors LLC v Kay-Co Invs., Inc.

2008 NY Slip Op 31751(U)

June 19, 2008

Supreme Court, New York County

Docket Number: 0602768/2007

Judge: Charles E. Ramos

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

PRESENT: _____

PART _____

Justice

Index Number : 602768/2007
TERWIN ADVISORS LLC
 VS.
KAY-CO INVESTMENTS
 SEQUENCE NUMBER : # 001
 DISMISS COMPLAINT

INDEX NO. 602768-01
 MOTION DATE _____
 MOTION SEQ. NO. #001
 MOTION CAL. NO. _____

to be 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

FILED

JUN 24 2008

NEW YORK
COUNTY CLERK'S OFFICE

Is decided in accordance with
accompanying memorandum decision and order.

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

Dated: 6/19/08

P
J.S.C.

HON. CHARLES E. RAMOS

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:COMMERCIAL DIVISION
-----X
TERWIN ADVISORS LLC,

Plaintiff, Index No. 602768/07

-against-

KAY-CO INVESTMENTS, INC., d/b/a PACIFIC
CAPITAL MORTGAGE and PRO 30 FUNDING,
KAY COLEMAN and WILLIAM COLEMAN,

Defendants,
-----X

FILED

Charles Edward Ramos, J.S.C.:

Defendants William Coleman and Kay Coleman (together, the
Colemans) move to dismiss the three causes of action asserted
against them individually [CPLR §§ 3211(a)(7), (8); CPLR §
3016(b)].

Terwin cross-moves for leave to file an amended complaint to
assert additional causes of action against the Colemans [CPLR
3025(b)].

Background

On January 27, 2005, Terwin and defendant Kay-Co
Investments, Inc. (Kay-Co), entered into a purchase agreement
(Purchase Agreement), for the sale of certain mortgage loans to
Terwin. William Coleman signed the Agreement as the Chief
Executive Officer on behalf of Kay-Co. The Purchase Agreement
obligated Kay-Co to repurchase mortgages that went into early
default. Pursuant to the Purchase Agreement, Terwin purchased
mortgages from Kay-Co in the amount of approximately \$17 million
on May 24, 2007. Terwin alleges that the very next day, it
learned that Kay-Co had gone out of business.

Thereafter, Terwin instituted this action, alleging that

Kay-Co, by its principals, the Colemans, misrepresented its financial condition in order to induce the sale of mortgages to Terwin. It asserted a cause of action for breach of contract against Kay-Co, and seeks legal fees. Terwin asserted three causes of action against the Colemans individually, for breach of fiduciary duty and fraud, and seeks to pierce the corporate veil in order to find the Colemans personally liable.

Discussion

The Colemans move to dismiss the causes of action asserted against them for lack of personal jurisdiction. Additionally, they contend that the complaint fails to state a cause of action, under either California or New York law, and lacks the requisite specificity under CPLR 3016(b).

Terwin predicates jurisdiction over the non-domiciliary Colemans on New York's long-arm statute, CPLR § 302(a)(1), and (3), on the ground that they are the directors, officers and the controlling shareholders of Kay-Co that transacted business within this state, and that Kay-Co acted as the Colemans' agent. Additionally, Terwin contends that the Colemans' tortious conduct directly and foreseeably caused it damage within this state.

CPLR § 302(a)(1)

To determine whether non-domiciliaries are subject to personal jurisdiction in this state, a two-part analysis has been developed in which the court determines whether the requirements of New York's long-arm statute are satisfied, and if so, whether the exercise of jurisdiction would comport with principles of

constitutional due process (*LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214 [1990]).

CPLR § 302(a)(1) permits a court to exercise personal jurisdiction over a non-domiciliary if the non-domiciliary conducts "purposeful activities" within the state and the claim against the non-domiciliary involves a transaction bearing a "substantial relationship" to those activities (*Deutsche Bank Sec. Inc. v Montana Bd. of Inv.*, 21 AD3d 90, 93 [1st Dept 2005], 7 NY3d 65, *cert denied* 127 US 832 [2006]). Thus, the threshold inquiry is whether there was a "transaction of business" within this state (*Opticare Acquisition Corp. v Castillo*, 25 AD3d 238, 243 [2nd Dept 2005]).

A transaction of business for the purposes of this statute covers a wide range of activities and may be predicated upon proof of a single act alone, so long as the defendant's activities were purposeful, and the requisite nexus between the business transacted and the cause of action sued upon is demonstrated, even if the defendant has never actually entered the state (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]). The mere solicitation of business in New York, without more, does not establish the requisite contacts between the state and the non-domiciliary (*Holness v Maritime Overseas Corp.*, 251 AD2d 220, 222 [1st Dept 1998]).

The Colemans are non-domiciliaries and are residents of California. According to William and Kay Coleman's affidavits, they executed the Purchase Agreement in their capacity as

officers of Kay-Co. Otherwise, they state that they do not maintain bank accounts in New York, did not attend meetings in New York on behalf of Kay-Co, did not contract for the supply of goods or services in New York, and did not solicit business personally or on behalf of Kay-Co while present in New York (Affidavit of Colemans, ¶¶ 4-13).

Kay-Co consented to jurisdiction in New York, based upon a New York a choice-of-forum clause, contained in the Purchase Agreement (Purchase Agreement, §§ 12.04, 12.18). However, the fact that the Purchase Agreement contains a New York forum selection clause does not necessarily subject its officers and directors, the Colemans, to the jurisdiction of this court (*SNS Bank, N.V. v Citibank, N.A.*, 7 AD3d 352, 354 [1st Dept 2004]).

A corporation's submission to jurisdiction within this state by the insertion of a forum selection clause located in an agreement does not render its non-domiciliary agents personally subject to jurisdiction (*id.*; *Kinetic Instruments, Inc. v. Lares*, 802 F Supp 976 [SD NY 1992]). Rather, a corporate employee may only be subject to personal jurisdiction if the corporation engages in purposeful activities in New York in relation to the transaction at issue for the benefit of, and with the knowledge and consent of the individual defendant-corporate employee, and if the employee exercised control over the transaction (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]). Further, a corporation can act as an agent for an individual, in the same vein as an individual can act as an agent for a corporation, for

the purposes of New York's law-arm statute (*id.*).

The complaint does not allege sufficient facts from which it can be inferred that the Colemans controlled the transaction at issue, or otherwise, that Kay-Co acted as the Colemans' agent (*Kreutter*, 71 NY2d at 467). The mere fact of the Colemans' positions as officers, directors, and controlling shareholders of Kay-Co, with out more, is not enough to establish their control over Kay-Co and the transaction at issue for jurisdictional purposes.

Further, while the complaint does allege that the Colemans were the primary actors in the allegations that gave rise to this action, it does so on information and belief and in conclusory fashion. Therefore, because the complaint does not sufficiently plead that the Colemans exercised control over the transaction, or that the corporation, Kay-Co, was really acting as the Colemans' agent, or otherwise, that the Colemans transacted business in New York, Terwin has not established that this court has personal jurisdiction over the Colemans under CPLR § 301 (a) (1).

CPLR § 302(a)(3)

Terwin additionally seeks to predicate personal jurisdiction over the Colemans under CPLR § 302(a)(3), that requires the commission of a tort without the state causing injury within the state, if those defendants expected their actions to have consequences in the state.

In determining whether there is injury within this state

sufficient to predicate jurisdiction under CPLR § 302(a)(3)(i), courts conduct a "situs of the injury" test to locate the original event which caused the injury (*Uzan v Telsim Mobile Telekomunikasyon Hizmetleri A.S.*, _ AD3d _, 2008 NY Slip Op. 04276 [1st Dept 2008]). Thus, the relevant inquiry is where the original event that caused the injury occurred, and not where the resultant damages took place (*id.*).

Terwin argues that New York is the situs of the injury because Terwin is a New York plaintiff, and suffered the alleged loss in New York. However, while the resultant loss claimed by Terwin is the financial loss it suffered in New York, such consequent economic injury is insufficient to render New York the situs of the injury within the meaning of CPLR § 302(a)(3).

"The occurrence of financial consequences in New York due to the fortuitous location of plaintiffs in New York is not a sufficient basis for jurisdiction under CPLR § 302(a)(3), where the underlying events took place outside of New York" (*Whitaker v American Telecasting, Inc.*, 261 F3d 196, 209 [2d Cir 2001]; *Cooperstein v Pan-Oceanic Mar., Inc.*, 124 AD2d 632, 633 [2d Dept 1986], *appeal denied* 69 NY2d 611 [1987] [to satisfy the first part of CPLR § 302(a)(3), there must be "a more direct injury within the State than the indirect financial loss resulting from the fact that the injured person resides or is domiciled here"]).

The original event that ultimately resulted in the loss to Terwin was the Colemans' alleged fraudulent concealment to Terwin that Kay-Co was insolvent at the time that the Purchase Agreement

was executed, that occurred in California, where the Colemans were located when they allegedly induced Terwin (*accord Marie v Altshuler*, 30 AD3d 271, 272-73 [1st Dept 2006]).

Furthermore, the court is not persuaded that affording Terwin the right to conduct jurisdictional disclosure pursuant to CPLR 3211(d) would be justified. Terwin has failed to demonstrate a "starting point" to show that jurisdiction over the Colemans could exist, thereby justifying such disclosure (*see Insurance Co. of N. Am. v EMCOR Group*, 9 AD3d 319, 320 [1st Dept 2004]).

Therefore, in the absence of a New York situs of injury, this court does not have personal jurisdiction over the Colemans under CPLR § 302(a)(3). Having determined that the Colemans are not subject to this Court's jurisdiction, the cross-motion to amend the complaint to add additional claims against the Colemans is denied.

Accordingly, it is

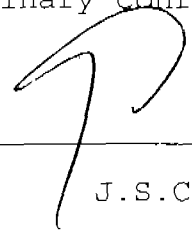
ORDERED that the motion to dismiss is granted and the third, fourth, and fifth causes of action are dismissed, as against Kay Coleman and Williams Coleman; and it is further

ORDERED that the cross-motion to amend the complaint is denied; and it is further

ORDERED that defendants Kay-Co Investments, Inc., d/b/a Pacific Capital Mortgage and PRO 30 Funding are directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry, and to contact the Part 53

Clerk for the purposes of scheduling a preliminary conference.

Dated: June 19, 2008



J.S.C.

HON. CHARLES E. RAMOS

FILED
JUN 27 2008
NEW YORK
COUNTY CLERK'S OFFICE