Calvert v Cove at Priest Lake

2008 NY Slip Op 32048(U)

June 30, 2008

Supreme Court, New York County

Docket Number: 0109957/2007

Judge: Judith J. Gische

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SCANNED ON 7/8/2008

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

PRESENT: HON. JUDITH J. GISCHE J.S.C. Justice

PART ______

Index Number : 109957/2007

CALVERT, JOE

VS.

COVE AT PRIEST LAKE

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

MOTION CAL. NO. CPLR 3211

is motion to/for Sanctions, costs atty's fees, etc.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED JUL 08 2008 COUNTY CLERK'S OFFICE NEW YORK

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

Dated: 6/30/08

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

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

Check if appropriate [ ] DO NOT POST [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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JOE CALVERT and LORETTA CALVERT,

Plaintiffs,

-against-

COVE AT PRIEST LAKE and "John Doe" #1 through "John Doe" #10, the names of the last ten defendants being fictitious or corporate names being unknown to the plaintiffs, who have been or are currently the owner of the premises located at 3960 Bell Road, Hermitage, Tennessee,

Defendants.

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Decision/Order
Index No.: 109957/07
Seq. No. : 001

Present:
Hon. Judith J. Gi[illegible]
J.S.C.

FILED
JUL 08 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Papers	**Numbered**
Def's pre-answer motion [dismiss] w/LAR affirm in support, BO affid, exhs	1
Pltf's cross mtn [sanc], LC affid, exhs	2
Transcript 5/8/08	3

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

This is an action by plaintiffs, former tenants, for damages they allegedly sustained during their tenancy in an apartment complex located in Tennessee. Defendant Cove at Priest Lake ("Cove") now moves, pre-answer, to dismiss this action for lack of jurisdiction, and for sanctions, costs, and attorneys fees. CPLR § 3211 (a). Plaintiffs oppose the motion and cross-move for sanctions, entry of a default against the defendants, conversion of the instant motion to dismiss to one for summary judgment (CPLR § 3212 [c]), and for an order directing discovery and a hearing

pursuant to CPLR § 2218.

Cove is an apartment complex located in Hermitage, Tennessee. Cove is owned by Gray Property 6001, LLC ("Gray"). Gray is a Virginia limited liability company licensed to do business in Tennessee. Plaintiffs are Joe Calvert ("Mr. Calvert") and Loretta Calvert ("Mrs. Calvert). Plaintiffs reside in Dewitt, New York.

Preliminarily, the court denies plaintiff's cross-motion to the extent that it seeks conversion of the motion to dismiss into one for summary judgment and/or an order "direct[ing] discovery and a trial or hearing on status of ownership, advertising and correspondence between plaintiffs and defendants" pursuant to CPLR § 2218. The court finds no reason to convert this motion to one for summary judgment. Moreover, the issue of jurisdiction can and should be decided on the papers submitted herein, because plaintiffs have failed to show any "tangible evidence which would constitute a 'sufficient start' in showing that jurisdiction could exist, thereby demonstrating that its assertion that a jurisdictional predicate exists is not frivolous (Mandel v. Busch Entertainment Corp., 215 AD2d 455 [1st Dept 1995] see also Peterson v Spartan Indus., 33 NY2d 463, 467).

Nor are plaintiffs' entitled to entry of a default against Cove. On November 16, 2007, plaintiffs served the summons and complaint on "defendant's manager personally," who is otherwise unidentified and not described by the process server. It is unclear whether Cove is a corporation, a limited liability company, a partnership, or some other type of entity. Therefore, while Cove received notice of this action, such notice may not have been in strict compliance with the relevant statutes (see i.e. CPLR § 311, BCL § 307 [c] [2]). Nonetheless, the summons provides:

> You are hereby summoned to appear in this action by serving a notice of appearance on plaintiffs' attorney within twenty days after the service of this summons, exclusive of the day of service, or within thirty days after service is complete if this summons is not personally delivered to you within the State of New York.

On December 14, 2007, less than thirty days after Cove was served, Cove served and filed a motion to dismiss the complaint. Service of a CPLR § 3211 (a) or (b) motion "before service of a pleading responsive to the cause of action or defense sought to be dismissed extends the time to serve the pleading until ten days after service of notice of entry of the order." CPLR § 3211 (f). Therefore, Cove has not defaulted in this action and the motion to dismiss for lack of personal jurisdiction, being timely, is granted by this Court and the action is dismissed for the reasons that follow.

Relevant facts and arguments on the issue of personal jurisdiction

Plaintiffs state that during September, 2005, they had extensive contact with the defendants[1] via telephone, fax, mail and e-mail. There is no dispute that plaintiffs never visited Cove or even entered the state of Tennessee prior to "enter[ing into] an agreement with [Cove to provide] housing and services" on or about September 24, 2005. Mr. Calvert states in his affidavit that plaintiffs' "tenancy commenced in September 2005 with Hermitage Properties Inc. of Georgia by a boilerplate 'Apartment Lease Contract' furnished by the National Apartment Association." However, plaintiffs have not provided a copy of any alleged agreement with respect to their tenancy at Cove.

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[1] Cove is the only defendant which has been served in this action, the other defendants referred to hereinafter in this decision are unnamed in this action.

Nonetheless, it is undisputed that plaintiffs entered into a tenancy with an apartment at Cove (the "first apartment"). Plaintiffs state that they moved from the first apartment because it was uninhabitable, and were provided another apartment at the Cove (the "second apartment") with a corresponding rent increase. Plaintiffs further allege that the second apartment also had "significant defects" and that defendants refused to make repairs despite acknowledging that such repairs were necessary. Plaintiffs state that defendants breached the warranty of habitability and their contract with plaintiff in.the following ways: "[1] failure to provide a habitable dwelling place; [2] failure to provide sufficient heat for human occupants; [3] failure to provide sealable or closeable windows; [4] failure to provide a functional, inspected swimming pool as represented; [5] failure to repair or seal doors; [6] failure to repair loose flooring; [7] failure to dispose of garbage; and [8] failure to provide a security gate as represented."

In the complaint, plaintiffs assert ten causes of action, namely: [1] breach of the warranty of habitability; [2] willful diminution or termination of plaintiff's use of the apartments; [3] intentional and/or negligent tort and/or unjust enrichment; [4] fraudulent representation; [5] defendants' interference with plaintiff's right to quiet enjoyment; [6] partial constructive eviction; [7] conversion; [8] harassment; [9] intentional and/or negligent infliction of emotional distress; and [10] intentional infliction of pecuniary harm.

Cove moves to dismiss the complaint on jurisdictional grounds. Cove has provided the affidavit of Beth Owens ("Owens"), a district manager for Gray who "oversee[s] the Cove at Priest Lake Apartments", whereupon Cove contends there is no jurisdiction pursuant to either CPLR § 301 or CPLR § 302. Cove argues that as a

nonresident and because it does not "do any business or advertise for business in New York", plaintiffs alleged injuries took place in Tennessee and the subject lease "was drafted in Tennessee following Tennessee law", there is no basis for jurisdiction.[2]

Plaintiffs assert that this court has jurisdiction because "the fraudulent inducement to contract and contract execution occurred in New York." Mr. Calvert states that the documents "to induce and complete contract were delivered electronically and physically to plaintiffs" at their home in Dewitt, New York. Plaintiff states that "there is and has been a substantial amount of interactive internet advertising in New York." According to Mr. Calvert, plaintiffs learned of the Cove through internet advertising. Plaintiffs have provided on-screen print-outs from Cove's website which does in fact advertise various apartments available for rent. Plaintiffs also state that Cove advertises its services through advertising provider ForRent.com which is hosted in Lake Placid, New York. Plaintiffs contend that through this advertising, defendants have "purposefully target[ed] residents of the State of New York for financial gain through a variety of sources."

Plaintiffs have also provided copies of Calvert and Calvert, P.C.'s phone bill statements dated September 16, 2005 and October 16, 2005, which they claim demonstrate significant telephone activity between plaintiffs and defendants. Plaintiffs claim that twelve phone calls were made by Cove to plaintiffs from 9/13/05 through

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[2] Plaintiffs argue that Owens does not have personal knowledge of the events which gave rise to plaintiffs' injuries, and because the Owens affidavit was signed and sworn to ten days before service of the summons and complaint was effectuated, "the affidavit is either false or nonresponsive to plaintiff's complaint." Plaintiffs maintain further because Gray was allegedly not the owner of Cove at "any time during the year 2005 and the majority of 2006", the Owens affidavit is "worthless." However, these arguments are rejected at the outset, because despite plaintiffs' objections, Owens may have personal knowledge of the facts she attests to, and in any event, the facts stated in her affidavit are not in dispute.

9/30/05. Most of the phone call were less than one minute in duration and the longest phone call lasted approximately eight minutes. As to the substance of the phone calls, Mrs. Calvert states in her affidavit that "on or about September 18, 2005 after applying for the apartment, Natalie Wheeler, an agent of the Defendant telephoned [her] at [her] home in New York to say that [her] social security number retrieved someone else's name during the credit report." Mrs. Calvert also alleges that plaintiffs "were approved for the apartment and made the choice of which apartment over the telephone on the basis of a map of the property and the representations of Ms. Wheeler that later proved to be false."

The court acknowledges that plaintiffs have only provided proof of telephone calls between themselves and Cove. No copies of the alleged faxes, emails or mail correspondence have been provided to the court, nor have plaintiffs provided any information about the contents of any such alleged communications.

Mr. Calvert also states that the "housing agreement was applied for, executed, and paid as due on a New York bank (JP MORGAN CHASE BANK) in Dewitt, New York."

Discussion

Since it is undisputed that defendants are not subject to general jurisdiction based on presence or domicile in New York under CPLR § 301, in order for plaintiffs' to avoid dismissal for lack of personal jurisdiction, the court must find that Cove is subject to long-arm jurisdiction in New York.

To determine whether a non-domiciliary may be sued in New York, the court must first determine whether New York's long-arm statute, CPLR § 302, confers

jurisdiction over it in light of its contacts with this State. LaMarca v. Pak-Mor Mfg. Co., 95 NY2d 210 (2000). If any of the provisions of CPLR § 302 apply, then the court must determine whether the exercise of jurisdiction comports with due process (id). The purpose of CPLR § 302 is 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 NY2d 13 (1970).

Under CPLR 302 (a) (1), "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." Proof of one transaction in New York is sufficient to invoke jurisdiction, even if the defendant never enters New York, so long as the defendant's activities here were "purposeful and there is a substantial relationship between the transaction and the claim asserted" (Deutsche Bank Securities, Inc. v. Montana Bd. of Investments, 7 NY3d 65, 71 [2006] quoting Kreutter v McFadden Oil Corp., 71 NY2d 460 [1988] [internal quotations omitted]).

Where a defendant moves to dismiss the complaint asserting that the court lacks personal jurisdiction over them, the plaintiff bears the burden of proof (see Barington Capital Group, L.P. v. Arsenault, 281 AD2d 166 [1st Dept 2001]). However, in responding to such a motion, plaintiff need only demonstrate that facts "may exist" to exercise personal jurisdiction over the defendant (Hessel v. Goldman, Sachs & Co., 281 AD2d 247 [1st Dept 2001]).

Here, affording plaintiffs' allegations every favorable inference, defendants' dealings with plaintiffs, which were not conducted in-person, but were only by telephone, mail, fax and e-mail, are insufficient to confer jurisdiction. "[S]ending faxes

and making phone calls to this State are not, without more, activities tantamount to 'transacting business' " within the meaning of the CPLR 302 (a) (1) (Granat v. Bochner, 268 AD2d 365 [1st Dept 2000]; see also Etra v. Matta, 61 NY2d 455 [1984]; L.F. Rothschild, Unterberg, Towbin v. McTamney, 89 AD2d 540 [1st Dept 1982] aff'd 59 NY2d 651 [1982]). Similarly, negotiation and execution of contracts by mail and telephone with persons residing in New York is not generally a sufficient basis for personal jurisdiction over non-domiciliaries (Fischbarg v. Doucet, 38 AD3d 270 [1st Dept 2007)].

And while courts have upheld the exercise of jurisdiction under CPLR § 302 (a) (1), where the defendant has never entered New York, in such cases the defendant must have "actively" projected itself into New York (Worldwide Futgol Assocs. v. Event Entertainment, 983 FSupp 173, 177 [1997]; Parke-Bernet, *supra* at 18; Liberatore v. Calvino, 293 AD2d at 220). In Otterborg, Steindler, Houston & Rose, P.C. v. Shreve City Apartments Ltd., the First Department held that an Illinois client of a New York law firm transacted business in New York via 93 telephone conversations, numerous letters, participation in multiple conference calls (147 AD2d 327 [1st Dept 1989]). Here, the phone calls allegedly made by defendants to plaintiffs show, at best, that Cove provided services to plaintiff in connection with plaintiffs' tenancy at Cove and do not demonstrate active solicitation by Cove for business in New York. "New York courts have consistently refused to sustain section 302(a)(1) jurisdiction solely on the basis of defendant's communications from another locale with a party in New York" (Beacon Enterprises, Inc. v. Menzies, 715 F2d 757, 766 [2d Cir.1983]; see also Hearst Corp. v. Goldberger, 1997 WL 97097 [SDNY 1997] [contains an extensive discussion of many

cases where mere communications were insufficient to confer personal jurisdiction]). The alleged phone calls here are, therefore, wholly insufficient to demonstrate the type of purposeful activity required in Deutsche Bank, *supra* (see also Barington Capital Group, L.P. v. Arsenault, *supra* [five phone calls insufficient to confer jurisdiction over defendant]). As compared to Otterborg, *supra*, this case is far more analogous to Libra Global Technology Services (U.K.) Ltd. v. Telemedia International Ltd., where a 45-minute video-conference, during which the parties negotiated a portion of their contract, was insufficient to subject the defendants to New York jurisdiction (279 AD2d 326 [1st Dept 2001]).

Cove was not present at any point during the alleged negotiation of the subject agreement (cf. George Reiner & Co., Inc. v. Schwartz, 41 NY2d 648 [1977]). Nor is the property which formed the subject of plaintiffs' tenancy located in New York (cf. Black River Associates v. Newman, 218 AD2d 273 [4th Dept 1996]). The court also rejects plaintiffs' argument that this court should exercise jurisdiction over Cove simply on the circumstance that plaintiffs signed the subject agreement in New York or because plaintiffs made payments thereunder from a New York bank (see Libra Global, *supra*).

Nor is Cove's website advertising sufficient to confer jurisdiction. On this issue, courts must look to the nature and quality of commercial activity that an entity conducts over the internet (Andrew Greenberg, Inc. v. Sir-Tech Software, Inc., 297 AD2d 834 [3d Dept 2002] citing Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 FSupp 1119 [W.D.Pa.1997]). The websites utilized by Cove are passive in nature because, based upon the on-screen print-outs provided by plaintiffs, these websites merely post information about the properties and apartment units available and provide a phone

number for potential customers to utilize in order to place their business (see i.e. Bensusan Restaurant Corp., v. King, 937 FSupp 295 [SDNY1996], aff'd, 126 F.3d 25 [2d Cir.1997]; Citigroup, Inc. v. City Holding Co., 97 FSupp2d 549 [SDNY 2000]).

Similarly, the court rejects plaintiffs' proposition that Cove's utilization of a website hosted in Lake Placid, New York, is sufficient to confer jurisdiction. This is not the type activity that would either satisfy New York's long arm statute of the due process requirements discussed in International Shoe Co. v. Washington, 326 US 310 (1945). In addition, the cases cited by plaintiffs do not even support this argument. In CompuServe, Inc. v. Patterson, the defendant specifically targeted Ohio, the forum state, when he entered into a written contract to sell his software over the internet with a network service, the subject contract was governed by and to be construed under Ohio law, and defendant maintained an ongoing business relationship with the network service by advertising his software through the service and repeatedly sent his software to the service in Ohio (89 F3d 1257 [6th Cir. 1996]).

EDIAS Software Int'l, Inc. v. BASIS Int'l Ltd. involved alleged defamatory statements posted on the internet. The district court held the defendant's messages were directed at the forum, because that is where the plaintiff's business was located (947 FSupp 413 [D. Ariz.1996]). There is not even an allegation here that Cove directed its advertising at New York. In addition, many courts require individualized targeting of a resident of the forum state in order to exercise jurisdiction in defamation cases (see i.e. Medinah Mining, Inc. v. Amunategui, 237 FSupp2d 1132 [D.Nev. 2002]; Forever Living Products U.S. Inc. v. Geyman, 471 FSupp2d 980 [D.Ariz. 2006]).

In California Software Inc. v. Reliability Research, Inc., a 1986 case, it was

significant that the defendant intentionally utilized a bulletin board-like electronic message system to interfere with plaintiffs' business (631 FSupp 1356 [C.D.Cal.]). In Vacco v. Lipsitz, the defendant was actually present in New York (174 Misc2d 571 [N.Y.Sup. 1997]). Finally, Playboy Enterprises, Inc. v. Chuckleberry Pub., Inc. is inapplicable here because personal jurisdiction was not even at issue (939 F.Supp. 1032 [SDNY 1996]).

Accordingly, the court finds that Cove did not transact business in New York. Nor has a tortious act occurred in New York under CPLR § 302 (a) (2), because that section requires that the defendant or its agent be physically present in the state of New York. Feathers v. McLucas, 15 NY2d 443 [1965] cert. den. 382 US 905 [1965]. Nor does CPLR § 302 (a) (3) apply, where plaintiff has not demonstrated that Cove was engaged in interstate commerce within the meaning of either CPLR § 302 (a) (3) (i) or (ii). Accordingly plaintiff's cross-motion is denied in all respects and Cove's motion to dismiss plaintiff's complaint is granted and the complaint is hereby severed and dismissed.

However, Cove's motion for costs, sanctions and attorneys fees is denied in all respects. While plaintiffs 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 NY2d 161 (1993). Certainly, the cross-motion for sanctions should be denied.

Conclusion

In accordance herewith, it is hereby:

ORDERED that defendant's motion to dismiss the complaint is granted in its

entirety and the complaint is hereby severed and dismissed; and it is further

ORDERED that defendant's motion is otherwise denied; and it is further

ORDERED that plaintiffs' cross-motion is denied in its entirety.

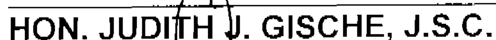
The clerk is hereby directed to enter judgment in accordance herewith.

Any requested relief which has not been addressed herein has been considered and is hereby expressly denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
June 30, 2008

So Ordered:



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

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