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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 31
NASSAU COUNTY

S. J. STILE ASSOCIATES, LTD.

Plaintiff.

Sequence No.: 001
Index No.: 011143/08

- against -

CARMEN CARBALLO.

Defendant.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	**X**
Notice of Cross-Motion and Affidavits Annexed	
Answering Affidavits	**X**
Replying Affidavits	**X**

Upon reading the papers submitted and due deliberation having been had herein, defendant's motion for an order dismissing the complaint on the grounds of lack of jurisdiction or forum non-conviens is determined as set forth below.

Plaintiff, a New York corporation that employed defendant as its New Jersey branch manager maintains, at best the court can guess, causes of action against defendant for breach of contract, tortious interference with contract and possibly *prima facie* tort. The court is in the position of guessing what plaintiff's claims are because no party has annexed a copy of the very document upon which this motion is based, the complaint.

Defendant first moves to dismiss the complaint that as a New Jersey resident with insufficient ties to New York, this court lacks personal jurisdiction over her. Defendant avers:

1) she served as plaintiff's import manager at its New Jersey office from May, 1996 until April, 2008;

2) she had been employed in the import field for twenty-two years prior to her employment with plaintiff;

3) she came to plaintiff with a book of nine customers who were then all placed with plaintiff;

4) the New Jersey branch handled a total of thirty-six customers during defendant's tenure;

5) after her departure from plaintiff six of those customers known as the "Carballo accounts" went with defendant to her present employer and after plaintiff closed its New Jersey office;

6) one of the Carballo accounts, Impol Aluminum Corp., is located in New York and all business by defendant during her time with plaintiff was conducted by telephone and fax;

7) the other five are located in either New Jersey or in Ohio;

8) she has had no material contact with New York in twenty-four years;

9) she never executed an employment agreement, non-disclosure agreement or non-competition agreement with plaintiff;

10) the New Jersey office was self-sufficient and operated exclusively in New Jersey;

11) she never reviewed nor was required to review her business with plaintiff's New York office; and

12) her retirement plans were to be a full time employee with a different customs broker located in New Jersey for three months and thereafter to serve as a part time employee.

Defendant asserts that plaintiff has failed to obtain jurisdiction over defendant based upon New York's long arm statute, CPLR 302. Defendant contends that plaintiff may not rely on the provision in CPLR 302(a)(1) which provides that long arm jurisdiction may be obtained over a defendant who transacts business in this state or contracts to supply goods or services in this state. The New Jersey office, argues defendant, was free standing and self contained with its own management and staff whose customers solicited defendant. Further, defendant asserts that no services were provided by her in or from New York, but were exclusively performed in New Jersey. There were no meetings held in New York requiring defendant's attendance.

Defendant further asserts that there is no basis to find that plaintiff has obtained long arm jurisdiction over defendant pursuant to CPLR 302(a)(3) which provides for said jurisdiction in those circumstances in which defendant commits a tort outside of New York state that injures a plaintiff located within New York state. In support of this position defendant asserts that plaintiff is unable to demonstrate that it suffered injury in New York because under New York law the injury locale is that where the tort originated. Further, defendant contends that for the reasons set forth above it cannot be held that defendant regularly does or solicits business in New York, one of the requirements of CPLR 302(a)(3).

In opposition to this branch of the motion plaintiff argues that this court has personal jurisdiction over defendant pursuant to CPLR 302(a)(1) because defendant need not physically be present in this state to be subject to long arm jurisdiction. Defendant will be found to have a sufficient nexus based upon her relationship with the New York plaintiff as evidenced by such factors as her being required to report to her New York employer and whether the payroll was paid from New York.

In support of its position, plaintiff provides the affidavits of four employees, one of

which, that from Janis Wong, is relevant to the instant motion. Ms. Wong, plaintiff's accounting department supervisor avers that:

1) her department was responsible for the accounting of the New Jersey branch and is located in Valley Stream, New York;
2) the payroll for the New Jersey branch is paid out of plaintiff's New York headquarters; and
3) defendant was responsible for reconciling the accounts on a daily basis and would speak with Ms. Wong's department on a daily basis.

Pursuant to CPLR 3211 (a)(8) a defendant may move to dismiss a complaint on the grounds of lack of personal jurisdiction.
Pursuant to CPLR 302(a)(1) :

> "As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent: transacts any business within the state or contracts anywhere to supply goods or services in the state."

It has been held that the first requirement for long arm jurisdiction to be obtained under this section is that a business transaction occur in New York State. See, Ferrante Equipment Company v. Lasker-Goldman Corp., 26 N.Y.2d 280 (1970). In Opticare Acquisition Corp. v. Castillo, 25 A.D.3d 238 (2nd Dep't 2005) the Appellate Division, Second Department held that where out-of-state employees have a systematic and ongoing relationship with a New York employer, that same satisfies the requirement of a transaction which occurs in this state. In reaching its conclusion the court therein held that same is reflected by an employer-employee relationship in which the parties were in daily contact and the employer's product was sold in territories outside of this state which affected the local commerce in this state by bringing the New York employer into contractual relationships which create obligations and accounts receivable and payable for the New York employer. See, also, Smart Pros, Ltd. v. Straub, 24 A.D.3d 653 (2nd Dep't 2005).

Defendant asserts that Opticare is distinguishable from this matter because in that case there was identifiable proprietary information which plaintiff was attempting to prevent defendants from disseminating or recover damages for the dissemination thereof. Here, defendant claims that there is no such information which plaintiff is attempting to protect because there was no agreement between the parties to protect confidential information or for non-competition. While this may constitute the basis for a proper motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), same to this court does not form the basis to object to jurisdiction. The court is also not inclined to review whether plaintiff has set forth a cause of action in its complaint because no party has annexed a copy of same to its motion or opposition papers.

Additionally, the court must be satisfied that personal jurisdiction in this matter comports with the United States Constitution's Fourteenth Amendment's requirement of due process of law. Opticare, supra., citing LaMarca v. Pak-Mor Manufacturing, 95 N.Y.2d 210. In order for the courts of this state to exercise personal jurisdiction over a non-domiciliary defendant where the defendant has such minimum contacts with the state it must be found "that maintenance of the suit does not offend traditional notions of fair play and substantial justice." International Shoe Co. V. Washington, 326 U.S. 310. Such is satisfied where, as here, defendant "has availed [herself] of the 'privilege of conducting business there, and because [her] activities are shielded by the benefits and protections of the forum's laws, it is presumptively not unreasonable to require [her] to submit to the burdens of litigation in that forum as well' (Burger King Corporation v. Rudzewicz, 471 U.S. 462)." Opticare, supra., at 247-248. Where, as here, defendant "purposefully directed [her] activities toward New York-the State in which [her] employer is headquartered" the court will find that defendant has availed herself of the privilege of conducting business in this state" and will find the requisite minimum contacts. Id., at 248.

Where, as here the minimum contacts are established, it must be determined by the court whether such other factors are present to determine whether the exercise of the long arm jurisdiction would comport with fair play and substantial Justice. Opticare, supra., citing International Shoe Co. V. Washington, supra. The factors to be considered include 1) the burden on the defendant; 2) the forum state's interest in adjudicating the dispute; 3) plaintiff's interest in obtaining convenient and effective relief; 4) the interstate judicial system's interest in obtaining the most effective resolution of controversies; and 5) the shared interest of the several states in furthering fundamental substantive social policies. Id.

Where, as here, defendant agrees to serve as a branch manager for a New York employer, she may not be heard to complain about any burden of being sued in a New York State court. Opticare, supra. The other factors appear to be satisfied here in that this court has an interest in adjudicating a dispute involving one of its corporate residents, plaintiff properly brought this action in this state and in the county in which it is headquartered, and plaintiff no longer maintains a New Jersey office.

The court also finds that plaintiff has established jurisdiction pursuant to CPLR 302(a)(3) where, as here, in a matter where plaintiff alleges the tortious removal of proprietary information that same constitutes an alleged tortious act committed in New Jersey which injured plaintiff in New York. See, Sybron Corporation v. Wetzel, 46 N.Y.2d 197 (1978).

Defendant also seeks dismissal on the grounds of forum non-conveniens. "The burden is on a defendant challenging the forum to demonstrate "relevant private or public interest factors which militate against accepting the litigation". (Islamic Republic of Iran v. Pahlavi, 62 N.Y.2d 474, 479, 478 N.Y.S.2d 597, 467 N.E.2d 245, *cert. denied* 469 U.S. 1108, 105 S.Ct. 783, 83 L.Ed.2d 778)". Korea Exchange Bank v. A.A. Trading Co., 8 A.D.3d 344 (2nd Dep't 2004). In determining whether to grant a motion to dismiss for forum non-conveniens, the court will consider such factors as the residency of the parties, the potential hardship to proposed witnesses,

the availability of an alternative forum, the situs of the original action and the burden on New York's courts, with no one factor controlling. See, Stravalle v. Land Cargo, Inc., 39 A.D.3d 735 (2nd Dep't 2007). Defendant makes no such demonstration in support of this branch of the motion.

Accordingly, based upon the foregoing, defendant's motion is denied in its entirety.

So Ordered.

A.J.S.C.

Dated: November 20, 2008

ENTERED
DEC 01 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE