

Goodwin v Themestar Ltd.

2009 NY Slip Op 30159(U)

January 23, 2009

Supreme Court, New York County

Docket Number: 601197/08

Judge: Martin Shulman

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

MARTIN SHULMAN

PRESENT: J.S.C.
Justice

PART 1

Index Number : 601197/2008
GOODWIN, JOHN
vs.
THEMESTAR, LIMITED
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. 601197/08
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED
1
2
3

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ... A
Answering Affidavits — Exhibits A-N
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *is decided in accordance with the attached decision and order.*

FILED
JAN 28 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: JAN 23 2009

MARTIN SHULMAN *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

-----X
JOHN GOODWIN,

Plaintiff,

- against -

THEMESTAR LTD.,

Defendant.

-----X

Index No. 601197/08

FILED
JAN 28 2009
COUNTY CLERK'S OFFICE
NEW YORK

SHULMAN, J.:

Defendant Themestar Ltd., a foreign company, moves to dismiss the complaint on the basis of lack of jurisdiction.

On June 28, 2007, plaintiff John Goodwin suffered a severe electrical shock at his workplace in Shanghai, China. Plaintiff was directing a show for the performance group, Cirque Du Soleil America, Inc. ("Cirque"), on tour in China. Plaintiff, a United Kingdom citizen, moved to New York City in August 2007.

Defendant is in the business of producing live entertainment. Defendant is organized under the laws of the British Virgin Islands, where it maintains its head office. It alleges that it is domiciled in Hong Kong and has offices in California, Maryland and Melbourne, Australia.

In connection with the Chinese tour, defendant and Cirque entered into a Performing Services Agreement ("PSA"). The PSA provided that defendant would do most of the marketing and sales for the tour, that it would find a site for the performance, and that it would provide logistical support, thus enabling Cirque to construct its offices and commence performance. The PSA also provided that it would

be governed by New York law and that disputes between the parties concerning the agreement would be heard by courts in New York State. Defendant subcontracted its obligations under the PSA to a Chinese company. Defendant maintains that it was not responsible for providing electricity to Cirque headquarters in China.

Defendant moves pursuant to CPLR 3211(a)(8), arguing that the court has no jurisdiction over it. Plaintiff contends that New York has jurisdiction over defendant pursuant to CPLR §§ 301 and 302(a)(3), and that defendant consented to jurisdiction in the PSA.

CPLR §301 permits New York to exercise jurisdiction over a non-domiciliary corporation that is doing business here (*Lancaster v Colonial Motor Freight Line, Inc.*, 177 AD2d 152, 156 [1st Dept 1992]). A foreign defendant that is “engaged in such a continuous and systematic course of doing business here as to warrant a finding of its presence in this jurisdiction” is subject to jurisdiction here (*McGowan v Smith*, 52 NY2d 268, 272 [1981] [citations and internal quotation marks omitted]). For jurisdictional purposes, the defendant’s presence must attest to “a continuous, permanent and substantial activity in New York” (*Landoil Resources Corp. v Alexander & Alexander Servs.*, 918 F2d 1039, 1043 [2d Cir 1990] [citations and internal quotation marks omitted]). Occasional or casual activity will not do (*id.*).

Any exercise of personal jurisdiction under New York statutes must comport with the minimum contacts requisites of due process (*M'Baye v World Boxing Ass'n*, 429 F Supp 2d 652, 656 [SD NY 2006]). Due process permits the exercise of jurisdiction in a broader range of circumstances than does CPLR §301. Thus, a foreign defendant that

[* 4]

is doing business under the New York statute also has minimum contacts sufficient to satisfy the due process standard (*id.*).

To evaluate jurisdiction under the doing business standard, the court closely considers the facts and circumstances in each case, because no single factor is dispositive (*id.*). The court looks at “the aggregate of the corporation’s activities” (*Jurlique, Inc. v Austral Biolab Pty., Ltd.*, 187 AD2d 637, 640 [2d Dept 1992]).

To be subject to jurisdiction, the foreign corporation must be doing business at the time the action was commenced, not when the claim arose (*Penny v United Fruit Co.*, 869 F Supp 122, 125 [ED NY 1994]; *Lancaster v Colonial Motor Freight Line, Inc.*, 177 AD2d 152, 156 [1st Dept 1992]). This case commenced on April 18, 2008.

Jurisdiction is premised on the allegation that defendant both directly and vicariously did business in New York. Plaintiff asserts that defendant, often in conjunction with other companies, presented or produced shows in New York. Plaintiff bears the burden of establishing jurisdiction (*Lamarr v Klein*, 35 AD2d 248, 250 [1st Dept 1970], *affd* 30 NY2d 757 [1972]). But when the question of jurisdiction is to be decided on the pleadings and without discovery, the plaintiff has only to establish that it may be able to discover facts showing that the defendant is doing business in New York (*Peterson v Spartan Indus., Inc.*, 33 NY2d 463, 467 [1974]). Plaintiff’s burden does not entail making a prima facie showing of personal jurisdiction (*id.*).

At this early stage of litigation, all pleadings and affidavits must be construed in a light favorable to the plaintiff (*see Hoffritz for Cutlery, Inc. v Amajac, Ltd.*, 763 F2d 55, 57 [2d Cir 1985]). If the plaintiff succeeds in showing that the defendant may be doing

business in New York, it may conduct limited discovery to allow for a jurisdictional determination on a more complete record (*National Union Fire Ins. Co. of Pittsburgh v Ideal Mut. Ins. Co.*, 122 AD2d 630, 633 [1st Dept 1986]).

On the internet, plaintiff found websites stating that Themestar produced shows in New York. Plaintiff submits printouts from various websites. One of the printouts states that "Thomas & Friends Live On Stage" was performed for three days in June 2007, in conjunction with HIT Entertainment, a company registered with the New York Department of State. Another show is "Dora the Explorer - Dora's Pirate Adventure," performed for five days in April 2006. A press release, dated July 8, 2008, announces that Themestar and AEG Live, which is registered with the New York Department of State, are forming a new partnership, to be known as AEG Themestar, to produce global entertainment. The press release states that AEG Themestar produces and presents family entertainment and that its customers are "promoters, venues, and presenters interested in driving traffic and increasing revenues through the use of" entertainment vehicles (McCallion Affirmation, Ex. J). AEG Themestar also "assists intellectual property owners" and has a "global sales network" and "expertise in turnkey management, operation and marketing" of live attractions (*id.*).

The traditional indicia which courts rely upon in deciding whether a foreign corporation is doing business in New York include: 1) the existence of an office in New York; 2) the solicitation of business in New York; 3) the existence of bank accounts or other property in New York; and 4) the presence of employees of the foreign defendant in New York (*Hoffritz for Cutlery, Inc. v Amajac, Ltd.*, 763 F2d at 58). In an uncontested

submission, defendant contends that it does not maintain an office in New York and never has, that it is not registered to do business in New York, that it has no bank account here, that it does not lease or own real or personal property here, and that it does not maintain a telephone, telephone listing, mail drop, post office box, or agent for any purpose in New York.

Inquiry does not end there, however, as the lack of traditional indicia does not foreclose the possibility of jurisdiction. In *Erving v Virginia Squires Basketball Club* (349 F Supp 709, 714-15 [ED NY 1972]), the court held that the defendant was subject to jurisdiction pursuant to CPLR §301 based on: a) the defendant's connections with the American Basketball Association which was headquartered in New York; b) defendant's regular and continual visits to New York "for the business purpose of playing professional games for profit"; and c) defendant's "dealings with New York business concerns . . . in furtherance of the business purpose in New York." Moreover, a finding of jurisdiction does not require defendant's physical presence in New York, provided that it conducts or directs business "with a fair measure of permanence and continuity" (*Anderson v Indiana Black Expo, Inc.*, 81 F Supp 2d 494, 500 [SD NY 2000], quoting *Landoil*, 77 NY2d at 33-34; see *Thomas Publ. Co. v Industrial Quick Search, Inc.*, 237 F Supp 2d 489, 491 [SD NY 2002] [soliciting customers in New York through an interactive website confers jurisdiction]).

While sketchy, plaintiff's allegations are sufficient to warrant discovery on the issue of defendant's doing business in New York. Plaintiff shows that defendant may have produced or presented some shows performed in New York. The court is urged to take judicial notice that producing a show involves extensive management, supervision,

planning and communicating with any affiliates or partners in New York. Whether such work was conducted directly or through another party, it is reasonable to assume that it involved a substantial amount of activity in New York, activity which may constitute doing business.

There are two theories by which the court may assert jurisdiction over a foreign defendant vicariously doing business through another company that is directly doing business in New York. One theory requires that the defendant and the New York-based company be in a parent/subsidiary relationship. The foreign entity must have such a degree of control over the entity doing business in New York that the latter is "merely a department of" the former (*Amsellem v Host Marriott Corp.*, 280 AD2d 357, 359 [1st Dept 2001], quoting *Delagi v Volkswagenwerk AG of Wolfsburg, Germany*, 29 NY2d 426, 432 [1972]; see also *Saraceno v S.C. Johnson & Son, Inc.*, 83 FRD 65, 67 n 5 [SD NY 1979] [immaterial which entity is the parent and which is the subsidiary]).

The second theory is agency, without the requirement of common ownership between the foreign corporation and the corporation doing business in New York (*Frummer v Hilton Hotels Int'l, Inc.*, 19 NY2d 533, 538 [1967]). The test for determining whether a foreign corporation can be deemed to be doing business in New York through its agent is whether the agent does all the business that the principal could do were it here by its own officials (*id.* at 537). The existence of a principal/agent relationship may be shown by express agency agreement (see *Berner v United Airlines*, 3 NY2d 1003, 1004 [1957]), or by actions taken by the New York-based entity with respect to third parties that were binding on the foreign defendant (*Welinsky v Resort of*

the World D.N.V., 839 F2d 928, 930 [2d Cir 1988]; *Gelfand v Tanner Motor Tours, Ltd.*, 385 F2d 116, 121 [2d Cir 1967], *cert denied* 390 US 996 [1968]).

Plaintiff alleges that defendant produced shows in New York through other related, affiliated or partnered parties. The allegations are enough to show that there may be discoverable facts as to whether that was the case.

The entertainments upon which plaintiff seeks to premise jurisdiction were performed in New York in 2006 and 2007. There is no indication of a performance in 2008, when this action commenced. Nonetheless, the 2006 and 2007 engagements indicate a regular course of activity, which may have extended to the following year. Plaintiff is entitled to find out whether defendant produced shows in New York in 2008.

In response to plaintiff's showing, defendant contends that it is related to an Australian company called Themestar Australia, which had no involvement in the production in China. Themestar Australia and defendant are related, but "functionally and operationally distinct" (Hartenstine Affidavit, ¶ 7). Themestar Australia, and not defendant, produced "Thomas & Friends Live On Stage." Neither defendant, nor any related entity, produced the New York engagement of "Dora the Explorer." Defendant was not involved in the Dora and Thomas live shows.

Defendant's contentions do not address the evidence that an entity named Themestar was involved with at least the Dora show, if not the others. In any event, these allegations do not alter the finding that plaintiff is entitled to obtain discovery. Where a motion to dismiss for lack of personal jurisdiction is supported by affidavits only, and plaintiff sets forth some facts that suggest that jurisdiction may exist, plaintiff's showing will not be defeated by the defendant's denial of plaintiff's allegations (see

Geller v Newell, 602 F Supp 501, 503 [SD NY 1984] [regarding a prima facie showing for CPLR §302 (a)]. Accordingly, defendant's motion is denied, with leave to move for the same relief after the completion of limited disclosure.

Finally, CPLR §302(a)(3) confers personal jurisdiction over a non-domiciliary who commits a tort outside the state causing injury in the state when the plaintiff's claim arises out of that tortious act. Under this statute, injury is sustained at the location of the original event that caused the injury, not at the location where the plaintiff feels the resultant damages (*McGowan*, 52 NY2d at 273-274). In addition, the residence or domicile of the injured party within New York is not a sufficient predicate for jurisdiction (*Fantis Foods v Standard Importing Co*, 49 NY2d 317, 326 [1980]). Plaintiff sustained his injury in China, not New York. His present residence in New York is not a predicate for jurisdiction.

As for the PSA, it does not contain defendant's consent to jurisdiction for the purposes of this case. Plaintiff was not a party to that agreement and may not rely upon its terms. Accordingly, it is

ORDERED that defendant's motion to dismiss the complaint is denied; and it is further

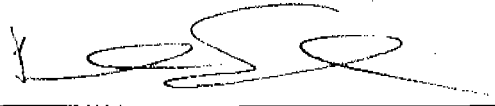
ORDERED that the parties may engage in limited discovery for the purpose of determining whether defendant was doing business in New York at the time this action was commenced; and it is further

ORDERED that defendant may move again for the same relief after said limited discovery is completed.

Counsel for the parties are directed to appear for a preliminary conference at I.A.S. Part 1, 111 Centre Street, Room 1127B, New York, New York on February 24, 2009 at 9:30 a.m.

This constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

DATED: New York, New York
January 23, 2009



HON. MARTIN SHULMAN, J.S.C.

FILED
JAN 28 2009
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NEW YORK