

Candlewood Holdings, Inc. v Moore

2009 NY Slip Op 31369(U)

June 15, 2009

Supreme Court, Nassau County

Docket Number: 21868/08

Judge: William R. LaMarca

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15

CANDLEWOOD HOLDINGS, INC.,

Plaintiff,

- against -

ROSALIE MOORE,

Defendant.

Motion Sequence #1
Submitted March 31, 2009
XXX

INDEX NO: 21868/08

The following papers were read on this motion:

Notice of Motion.....	1
Affirmation in Opposition.....	2
Affidavit in Further Support.....	3

Requested Relief

Defendant, ROSALIE MOORE, moves for an order, pursuant to CPLR §3211(a)(8), dismissing the complaint on the basis that this Court lacks jurisdiction over her and for an order, pursuant to CPLR §3211(a)(7), dismissing the plaintiff's complaint for failure to state a cause of action. Counsel for plaintiff, CANDLEWOOD HOLDINGS, INC. (hereinafter referred to as "CANDLEWOOD"), opposes the motion, which is determined as follows:

Background

CANDLEWOOD, a New York corporation formed in 1996, was in the car wash business. At the time of incorporation, defendant, ROSALIE MOORE, owned 100% of the company's shares. Thereafter, several agreements were executed which altered the

percentage of shares owned by the defendant. Specifically, pursuant to a Stock Acquisition Agreement, dated July 1, 1999, and a subsequent agreement, dated May 3, 2000, the defendant ultimately became a one third (1/3) shareholder in CANDLEWOOD, and ANO, a New York corporation, became a two-thirds (2/3) shareholder in the company. Since 2006, defendant MOORE has resided in the State of Massachusetts and, immediately prior thereto, resided in the State of Connecticut for approximately ten (10) years.

In or about December 2008, the underlying action was commenced by CANDLEWOOD to recover the sum of \$67,463.74, which represents the amount of a check issued by CANDLEWOOD made payable to ANO. In the complaint CANDLEWOOD alleges that, in January of 2005, this check was converted by the defendant when she came into possession of the check and that she subsequently endorsed, cashed and deposited the proceeds of same into her own personal checking account. The instant pre-answer application followed.

The defendant contends that the within action must be dismissed because she is a non-domiciliary of the State of New York over whom this Court does not possess long arm jurisdiction due to a lack of minimum contacts with the State of New York. The defendant asserts that she does not transact any business in New York, has not committed any tortious acts within the boundaries of the State, and does not own, use or possess any real property within this State. Additionally, the defendant contends that, while she denies the allegations contained in the complaint, even if they were true, they did not occur within New York and, as such, this State has no connection to the alleged conversion. The defendant contends that when the alleged conversion occurred, in January 2005, CANDLEWOOD's corporate account, from which the subject check was presumably drawn, was located and

maintained in the State of Connecticut as was defendant's own personal checking account into which she allegedly negotiated the proceeds of same.

In opposition to the within application, the plaintiff argues that the defendant has projected herself into New York and has purposefully availed herself of the benefits and protections under the law of this State and as such this Court has jurisdiction over the defendant, pursuant to CPLR §302 (a)(1). The plaintiff recites numerous activities undertaken by the defendant which it argues demonstrates that defendant has transacted business in New York and thus subjected herself to the jurisdiction of the State. With particularity, the plaintiff points to electing to incorporate CANDLEWOOD in New York, executing within New York various Shareholders Agreements dated July 1, 1999 and August 7, 2002, as well as an Assignment dated July 1, 1999, retaining a New York attorney to represent her interests as a shareholder in CANDLEWOOD, and signing several agreements which contained a clause stating the New York law would govern the provisions thereof.

The plaintiff alternatively argues that this Court can exercise jurisdiction over the defendant pursuant to CPLR §302(a)(3)(1). The plaintiff contends that the defendant caused injury to ANO in New York State by endorsing the subject check, which was payable to ANO, and thereafter retaining the funds for her own personal use.

In reply, the defendant reiterates those arguments previously set forth in support of the instant application and adds that, contrary to the plaintiff's assertion, she did not execute the Shareholders Agreements or the Assignment in New York, but rather executed said documents in Connecticut which were subsequently returned to New York. Defendant further argues that the mere existence of a choice of law provision contained in these

various agreements does not function as a consent on her part to be bound by the jurisdiction of this state.

The Law

CPLR §302 is New York's long-arm statute. Personal jurisdiction pursuant to CPLR §302 (a)(1) is proper, even though the defendant never enters New York, so long as the defendant's activities here were purposeful, and there is a substantial relationship between this activity and the plaintiff's cause of action (*Fischbarg v Doucet*, 9 NY3d 375, 849 NYS2d 501, 880 NE2d 22 [C.A.2007]); *Deutsche Bank Sec., Inc. v Montana Board of Investors*, 7 NY3d 65, 818 NYS2d 164, 850 NE2d 1140 [C.A.2006], cert. den. 549 US 1095 [2006]; *Kimco Exchange Place Corp. v Thomas Benz, Inc.*, 34 AD3d 433, 824 NYS2d 353 [2nd Dept. 2006]). Purposeful activities are those in which a defendant, through volitional acts, "avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections" of New York laws (*Fischbarg v Doucet, supra*, citing *McKee Elec. Co. v Rauland-Borg Corp.*, 20 NY2d 377, 283 NYS2d 34, 229 NE2d 604 [C.A.1967]). Telephone calls and written communications are generally an inadequate predicate for personal jurisdiction unless the defendant has "projected" himself into New York (*Liberatore v Calvino*, 293 AD2d 217, 742 NYS2d 291 [1st Dept. 2002] [citations omitted]).

CPLR§302 (a)(i) in relevant part states, that "a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent . . . transacts business within the state or contracts anywhere to supply goods or services in the state. . ." Integral to maintaining a suit against a non-domiciliary

under CPLR§302(a) (i) is the “existence of some articulable nexus between the business transacted and the cause of action sued upon” (*McGowan v Smith*, 52 NY2d 268, 637 NYS2d 643, 419 NE2d 321 [C.A.1981]). This provision of law has been deemed a “single act statute” where evidence of only one transaction is sufficient to invoke long arm jurisdiction, even though the defendant never enters the state “so long as the defendant’s activities here were purposeful and there is a substantial relationship between the transaction and the claims asserted” (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 527 NYS2d 195, 522 NE2d 40 [C.A.1988]; *Johnson v Ward*, 4 NY3d 516, 797 NYS2d 33, 829 NE2d 1201 [C.A.2005]; see also, *Deutsche Bank Securities, Inc. v Montana Board of Investments*, 7 NY3d 65, 818 NYS2d 164, 850 NE2d 1140 [C.A. 2006]; *McGowan v Smith*, *supra*). However, where the relationship between the claims asserted by a plaintiff and the defendant’s transactions is “too attenuated”, jurisdiction over a non-domiciliary will not be sustained (*Johnson v Ward*, *supra*).

Where, as here, the defendant has moved to dismiss the within complaint pursuant to CPLR §3211[a][8] on the ground of lack of personal jurisdiction, a plaintiff is only required to make a *prima facie* demonstration that such jurisdiction exists (*Lang v Wycoff Heights Medical Center*, 55 AD3d 793, 866 NYS2d 313 [2d Dept. 2008]; *Cornely v Dynamic HVAC Supply, LLC*, 44 AD3d 986, 824 NYS2d 797 [2d Dept 2007]). After a careful reading of the submissions herein, the Court finds that the plaintiff has failed to demonstrate the existence of a substantial relationship between the defendant’s alleged transaction of business and the claims asserted by the plaintiff (*Kreutter v McFadden Oil Corp.*, *supra*; *Johnson v Ward*, *supra*; see also *Deutsche Bank Securities, Inc. v Montana*

Board of Investments, supra; McGowan v Smith, supra).

As noted above, plaintiff alleges in the complaint that “on or about January 26, 2005, a check was issued by in [sic] the State of New York by Plaintiff, Candlewood Holdings, Inc. payable to ANO . . . in the amount of \$67,463.74” and that the “defendant converted said check” and “deposited said funds into her own personal checking account”. However, a careful review of the record herein reveals that the particular check which was allegedly converted by the defendant was not issued in the State of New York but, rather, was drawn on CANDLEWOOD’s corporate bank account which was maintained at NewMil Bank, in New Milford Connecticut. Furthermore, at the time of the alleged conversion, the defendant’s personal checking account, into which the proceeds were allegedly deposited, was also maintained in Connecticut. Thus, CANDLEWOOD’s claim of conversion arose from actions which occurred exclusively within Connecticut and not as result of defendants projection of herself into the State of New York.

Nor is there a substantial relationship between plaintiff’s claims and the documents purportedly executed in New York and which contained a New York choice of law provision or with her representation by a New York attorney undertaken in connection to her rights and obligations as a minority shareholder in the plaintiff corporation. The Court finds that neither the execution of the aforementioned Shareholders Agreements and Assignment, nor the choice of law provision therein, are sufficient to invoke long arm jurisdiction. As to execution of the various agreements, it has been held that there is no transaction of business where a contract is signed by the defendant outside the state and thereafter returned for the signature of other necessary parties (*Glassman v Hyder*, 23 NY2d 354, 296 NYS2d 783, 244 NE2d 259 [C.A.1968]). Here, the record indicates that the defendant

executed all of these documents in Connecticut and that each was thereafter delivered back to ANO in New York.

Furthermore, the Court rejects plaintiff's reliance upon the choice of law provisions as a basis for long arm jurisdiction. While these types of clauses can be deemed relevant in determining whether a non-domiciliary of New York in fact transacted business within the state, such a clause, without more, is insufficient to confer long arm jurisdiction (*Cutco Industries v Naughton*, 806 F2d 861 [2d Cir 1986]; see also *Burger King v Rudzewicz*, 471 US 462 [1985]). Given the foregoing analysis, said provisions are insufficient to confer long arm jurisdiction.

As to plaintiff's alternative position, that this Court can exercise jurisdiction over the defendant pursuant to CPLR§ 302(a)(3)(i), the statute provides that a Court may exercise jurisdiction over a non-domiciliary who in person, or through an agent, "commits a tortious act without the state causing injury to person or property within the state . . .". In order for jurisdiction to be conferred under this section of law, it is incumbent upon the plaintiff to establish, *inter alia*, that the cause of action is predicated upon the defendant's tortious acts undertaken outside the state and that such tortious conduct caused the plaintiff to sustain injury within the state (*LaMarca v Pak-Mor Manufacturing Company*, 95 NY2d 210, 713 NYS2d 304, 735 Ne2d 883 [C.A.2000]). In the case at bar, CANDLEWOOD does not contend that it suffered injury within the State as a result of the defendant's alleged tortious acts, but rather that the defendant caused "injury to ANO in New York." ANO is neither the plaintiff nor a party to the instant action and the Court concludes that plaintiff has not established a basis for long arm jurisdiction under CPLR §302(a)(3)(i).


Based upon the foregoing, it is hereby

ORDERED, that the motion by the defendant, ROSALIE MOORE, for an order, pursuant to CPLR §3211(a)(8), dismissing the complaint on the basis that this Court lacks personal jurisdiction is granted and the case is dismissed.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: June 15, 2009



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ENTERED
JUN 18 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE