

John v Assaraf

2009 NY Slip Op 32759(U)

November 16, 2009

Supreme Court, Nassau County

Docket Number: 6058/09

Judge: Daniel R. Palmieri

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Sum

SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----X

TRIAL TERM PART 47

BETH JOHN,

Plaintiff,

INDEX NO.: 6058/09

-against-

**MOTION DATE: 9-3-09
SUBMIT DATE: 10-14-09
SEQ. NUMBER - 002**

JOHN ASSARAF and ONECOACH, LLC,

Defendants.

**MOTION DATE: 9-14-09
SUBMIT DATE: 10-14-09
SEQ. NUMBER - 003**

-----X

The following papers have been read on this motion:

Notice of Motion, dated 8-12-09.....1
Affirmation in Opposition, dated 9-1-09.....2
Notice of Cross Motion, dated 9-1-09.....3
Memorandum of Law in Support, dated 9-1-09.....4
Affidavit in Support, dated 10-7-09.....5
Affidavit in Further Support, dated 10-7-09.....6
Memorandum in Further Support, dated 10-9-09.....7
Affidavit in Opposition, dated 9-28-09.....8
**Supplemental Memorandum in Further Support of
Plaintiff's Motion for Default, dated 10-10-09.....9**

Plaintiff, Beth John, moves for an order granting a judgment by default against the defendants John Assaraf and OneCoach, LLC. Defendants, John Assaraf and OneCoach, LLC., cross-move pursuant to CPLR 3211(a)(7) and (8) for an order dismissing the plaintiff's complaint.

Factual and Procedural Background:

In or about December 2006, the plaintiff, a medical doctor, entered into an agreement with OneCoach, LLC [hereinafter OneCoach], the CEO of which is individual defendant, John Assaraf. The terms of said agreement state that the OneCoach was to provide to the plaintiff "strategic advisory services" so as to aid her in developing the requisite skills through which she might "grow" her medical practice. In accordance with the agreement, the plaintiff remitted the sum of \$25,000. The plaintiff alleges that OneCoach failed to provide the services as articulated in the agreement.

This action was thereafter commenced. The complaint contains three causes of action. The first sounds in breach of contract; the second and third allege fraudulent and negligent misrepresentation. The latter are a consequence of defendant Assaraf's failure to refund the plaintiff's \$25,000, as he purportedly promised to do in the event Ms. John was unsatisfied with the services rendered. Service of process upon the respective defendants was attempted within the State of California.

By notice of motion dated June 9, 2009, the defendants moved pursuant to CPLR 3211(a)(8) for an order dismissing the complaint based upon lack of jurisdiction. On July 20, 2009, the Court issued a Short Form Order denying the application without prejudice and with leave to resubmit. The basis of said denial was that the individual representing the defendants was not an attorney licensed to practice in New York. The defendants, now represented by New York counsel, have resubmitted the application and move for the dismissal of the plaintiff's complaint pursuant to CPLR 3211(a)(7) and CPLR §3211(a)(8).

Defendants' Cross-Motion

The Court initially addresses the defendants' application seeking dismissal of the complaint based upon lack of jurisdiction. In support thereof, counsel argues that there are insufficient minimum contacts upon which New York may exercise long-arm jurisdiction over either of the named defendants herein. Counsel argues that the contract which forms the basis of the underlying action was executed in California, and that the services agreed to be performed thereunder were also to be done in California. Counsel provides a copy of the agreement executed by and between the parties which expressly states "The parties acknowledge that this agreement is entered into and shall be performed within the State of California, USA."

In addition to the agreement, counsel submits the affidavit of defendant John Assaraf, who avers that he does not solicit business within New York on behalf of the company, and that neither he nor OneCoach has ever owned any property, maintained any offices, had any bank accounts, or hired any employees within the state. Mr. Assaraf further contends that while there is an independent OneCoach franchise located within New York, the same is a separate entity which runs its own operations and is unrelated to OneCoach, LLC.

Finally, counsel contends that service upon both defendants was improper, warranting dismissal of the complaint. As to defendant John Assaraf, counsel posits that as proof of service was not filed within 120 days following the commencement of the action, the complaint must be dismissed pursuant to CPLR 306-b. With particular respect to OneCoach, counsel contends that service was not properly made upon an individual authorized to accept service on the company's behalf as required by CPLR 311-a.

The plaintiff opposes the instant application and argues the record demonstrates that the defendants have sufficient contacts within the state from which they derive sufficient revenue and accordingly, New York may exercise long arm jurisdiction. The plaintiff asserts that the presence of the New York franchise, coupled with three speaking engagements purportedly undertaken by John Assaraf in the state over the last five years, constitute sufficient minimum contacts upon which New York can exercise jurisdiction. The plaintiff additionally argues that while the fraudulent and negligent misrepresentations took place in California, the damages resulting therefrom occurred in New York.

Decision:

Although not denominated in the plaintiff's submission, as best can be adduced from the record, it appears that the plaintiff is predicating this Court's jurisdiction upon CPLR 302 [a][1] or CPLR 302 [a][3]. CPLR 302 [a][1] states, in relevant part, that "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. . . ." Integral to maintaining a suit against a non-domiciliary under CPLR 302[a][1] is the "existence of some articulable nexus between the business transacted and the cause of action sued upon". *McGowan v Smith*, 52 NY2d 268 (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 (1988); *Johnson v Ward*, 4 NY3d 516 (2005); *Deutsche Bank Securities, Inc. v Montana Board of Investments*, 7 NY3d 65 (2006); *McGowan v Smith*, 52 NY2d 268 (1981), *supra*. However, where the relationship between the claims asserted by a plaintiff and a defendant's transaction is "too attenuated", jurisdiction over a non-domiciliary will not be sustained. *Johnson v Ward*, 4 NY3d 516 (2005), *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 (2d Dept 2008); *Cornely v Dynamic HVAC Supply, LLC*, 44 AD3d 986 (2d Dept 2007). With respect to establishing jurisdiction under CPLR 302[a][1], the Court, after reviewing the record, finds that the plaintiff has failed to demonstrate *prima facie*, the existence of a substantial relationship between the defendant's alleged transaction of business and the claims asserted. *Kreutter v McFadden Oil Corp.*, 71 NY2d 460 (1988), *supra*; *Johnson v Ward*, 4 NY3d 516 (2005), *supra*; *Deutsche Bank Securities, Inc. v Montana Board of Investments*, 7 NY3d 65 (2006), *supra*; *McGowan v Smith*, 52 NY2d 268 (1981), *supra*.

As noted above, the plaintiff alleges that the defendants have transacted business as a result of the existence of an independent New York franchise and as a consequence of John Assaraf's three speaking engagements. However, the plaintiff's cause of action is not predicated upon either the activities of the franchise or Mr. Assaraf's purported speaking engagements. Rather, the plaintiff's cause of action sounding in breach of contract, as well

as negligent and fraudulent misrepresentation, is based exclusively upon a signed agreement executed between herself and OneCoach in 2006, for strategic advisory services to be rendered to the plaintiff by OneCoach in California.

Thus, based upon the lack of an "articulable nexus" between the defendants' alleged transaction of business and the claims asserted by the plaintiff, jurisdiction based upon CPLR 302[a][1] cannot be found. *McGowan v Smith*, 52 NY2d 268 (1981), *supra*.

The Court now addresses whether this Court can exercise jurisdiction over the defendants in accordance with CPLR 302[a][3]. Pursuant to this subdivision, 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 defendants' 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 (2000). Within the context of this statutory provision, "the situs of the injury is the location of the original event which caused the injury, not the location where the resultant damages are subsequently felt by the plaintiff". *Hermann v Sharon Hospital Inc.*, 135 AD2d 682 (2d Dept 1987); *McGowan v Smith*, 52 NY2d 268 (1981); *Carte v Parkoff*, 152 AD2d 615 (2d Dept 1989); *Marie v Althsuler*, 30 AD3d 271 (2d Dept 2006); *Vaichunas v Tonyes*, 61 AD3d 850 (2d Dept 2009). In the instant matter, the events which gave rise to the plaintiff sustaining \$25,000 in damages were the alleged misrepresentations of John Assaraf which, by the plaintiff's own admission, occurred in California and not in New York. Accordingly,

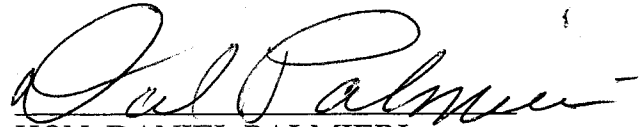
as the injury did not occur in New York, jurisdiction under this section is unavailable (*id.*).

Based upon the foregoing, the defendants' application interposed pursuant to CPLR 3211(a)(8) for an order dismissing the within complaint based upon lack of jurisdiction is hereby GRANTED and the plaintiff's application for a judgment by default is hereby DENIED as moot.¹

This shall constitute the Decision and Order of this Court.

ENTER

DATED: November 16, 2009


HON. DANIEL PALMIERI
Acting Supreme Court Justice

ENTERED

**TO: Beth John
Plaintiff Pro Se
341 Conklin Street
Farmingdale, NY 11735**

**NOV 18 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE**

**Kupfer & Associates, PLLC
By: Sharron E. Ash
Attorneys for Defendants
190 North 10th Street, Ste. 303
Brooklyn, NY 11211**

¹ Even had this Court addressed the merits of the plaintiff's application for a default judgment, the motion would have been denied. Upon review of the record, there is no showing that the plaintiff served the defendants with notice of entry of this Court's order, issued on July 20, 2009. Accordingly, the time within which defendants had to interpose an Answer has not begun to run and any application under CPLR 3215 was premature. CPLR 3211[f].