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

HON. CAROL EDMEAD

PRESENT: _____ PART 35

Justice

Index Number : 115889/2009

SONNENSCHEIN NATH & ROSENTHAL, LLP

vs.

HEMOFARM KONZERN A.D.

SEQUENCE NUMBER : 001

DISMISS

INDEX NO. _____

MOTION DATE 6.25.10

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

E 8/3/10 sc

n this motion to/for _____

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

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

RECEIVED
JUL 30 2010
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

FILED
AUG 04 2010
NEW YORK
COUNTY CLERK'S OFFICE

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendant Hemofarm Konzern A.D. to dismiss the complaint for lack of personal jurisdiction is denied, at this juncture, without prejudice, to permit the parties conduct discovery on the issue of personal jurisdiction over defendant Hemofarm Konzern A.D.; and it is further

ORDERED that the parties shall complete discovery on the issue of personal jurisdiction over defendant Hemofarm Konzern A.D. within 60 days from the date of service of this order
with notice of entry; and it is further

ORDERED that defendant Hemofarm Konzern A.D. serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 7.28.10

HON. CAROL EDMEAD J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MDAS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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SONNENSCHEIN NATH & ROSENTHAL LLP,

Index No. 115889-2009

Plaintiff,

-against-

DECISION/ORDER

HEMOFARM KONZERN A.D. and
HEMOFARM USA FOUNDATION,

Defendants.

----------x

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action to recover legal fees for services rendered, defendant Hemofarm Konzern A.D. ("defendant") moves to dismiss the complaint for lack of personal jurisdiction.

Factual Background

Plaintiff commenced this action to recover monies allegedly due and owning for legal services rendered.

In support of dismissal, defendant argues that plaintiff's Affidavit of Compliance and Mailing indicates that the Summons and Verified Complaint was served upon defendant by "Registered Mail with Return Receipt Requested, Pursuant to Section 307 of Business Corporation Law ["BCL"]." Service upon a defendant, where the initial service is made by personal service upon the Secretary of State, would be governed by BCL §307(b), states that such service upon the Secretary of State is sufficient if a copy of the pleadings are (1) delivered personally to such foreign corporation . . . or (2) sent "by registered mail with return receipt requested, at the post office address specified for the purpose of mailing process, on file in the department of state, or with any official or body performing the equivalent function, in the

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jurisdiction of its incorporation, or if no such address is there specified, to its registered or other office there specified, or if no such office is there specified, to the last address of such foreign corporation known to the plaintiff."

Defendant claims that it is a foreign corporation not authorized to do business in the State of New York, with a principal place of business located in Serbia. Defendant has no office or registered agent in New York. The Washington, D.C. address plaintiff used for service is not the address for service of defendant; nor is this address listed as an office for defendant. Additionally, the Affidavit of Compliance does not indicate that service upon the Secretary of State was followed or even attempted in accordance with BCL §307(b). Since proper service was not effectuated, plaintiff did not acquire jurisdiction over defendant.

In further support, defendant submits the affidavit of its President, Miodrag Babic ("Babic"), wherein he states that defendant does not transact or solicit business in New York, has no offices, postal boxes, bank accounts, telephone listings, agents or employees in New York. Babic attests that defendant is separate and independent from Hemofarm USA Corporation ("Hemofarm Corporation"), located in Washington D.C. Nor does defendant have offices at the address listed in the Affidavit of Compliance. Hemofarm Corporation's officers, board of directors, and books and records are separate from defendant, and Hemofarm Corporation is not an authorized agent for service for defendant. Further, defendant is separate and independent from defendant Hemofarm USA Foundation ("Hemofarm Foundation"), organized under Delaware law.

In opposition, plaintiff argues that defendant is not separate and independent from its Washington, D.C. branch Hemofarm Corporation, upon which service of process was made.

Hemofarm Corporation prominently identified itself on its website as a "division of" defendant and "the first American branch of Serbia's largest manufacturer, Hemofarm Koncern, A.D." Defendant's internet presence also demonstrates its connection to Hemofarm Corporation, in that the website states that the Hemofarm Corporation is a "division of Hemofarm Koncern, A.D." And, internet domains referring to Hemofarm.com and hemopharm.us are registered by defendant and list the same individual, Zoran Verovki, as the registrant or technical contact. It is alleged that such website was deactivated shortly after service of process was effected in this action.

In addition to other occasions dating back to 2007, Hemofarm Corporation's president wrote to plaintiff "on behalf of Hemofarm AD in response to [an] inquiry regarding the approximately $200,000 in legal fees owed to [plaintiff] by Hemofarm AD." Plaintiff received notice of Hemofarm Corporation's change of address from defendant, *via* email which contained two footers for defendant and Hemofarm Corporation. Further, plaintiff regularly communicated with individuals located at Hemofarm Corporation during the course of its representation of defendant. During the course of plaintiff's representation, plaintiff regularly communicated with individuals on behalf of defendant, both in Serbia and at Hemofarm Corporation. Defendant did not distinguish between its Serbian office and Hemofarm Corporation.

Plaintiff contends that it served defendant by personally serving the Secretary of State, and by mailing the pleadings by registered mail with return receipt requested to defendant at the Washington, D.C. address, as the last known address of defendant. Defendant does not have an address specified for receipt of process on file with Department of State, or an address specified for receipt of legal process on file in the Republic of Serbia. The Serbian Business Registers

Agency ("SBRA"), which serves the equivalent function for Serbian corporations as the New York Department of State performs for New York corporations, lists neither an address for receipt of legal process, nor a registered office, nor any other office for defendant; the SBRA lists defendant as a "non-active deleted enterprise" in Belgrade. Therefore, plaintiff properly utilized Hemofarm Corporation's address for service of the pleading upon defendant pursuant to BCL §307(b)(2).

Plaintiff further argues that defendant is subject to personal jurisdiction pursuant to New York's long arm statute and the exercise of jurisdiction would not offend due process. Here, defendant retained the services of plaintiff and worked principally with attorneys in plaintiff's New York office for nearly five years. Defendant regularly projected itself into New York by email and purposely availed itself of New York's market for legal services. Defendant's employees visited New York in connection with the legal services provided by plaintiff. And, there is no question that this action arises out of defendant's transaction of business in New York.

In the alternative, plaintiff argues that it is entitled to discovery on jurisdictional issues, as plaintiff has produced evidence, including various emails and documents of defendant's internet presence, that defendant and Hemofarm Corporation operate as a single entity.

In reply, defendant points out that the Washington D.C. address was not defendant's last known address; plaintiff mailed all of its invoices to Serbia, and never used the D.C. address on the invoices. By sending the invoices to Serbia, plaintiff knew that the companies have separate and distinct mission statements, boards, and accounts. Further, in order for a subsidiary to be deemed the parent's involuntary agent for service, the subsidiary must be so dominated by the

parent that it acts as a "mere department" or "mere instrumentality" of the parent. There must be such complete control by the parent over the subsidiary that it negates the conclusion that the subsidiary is operated as a separate and independent entity, and defendant denies any such complete control or dominion. Where plaintiff serves an employee of a separate corporate entity, which is not an agent of the defendant, and no evidence is submitted tending to show that the separate corporate entity was a wholly-owned subsidiary of the defendant, or was so dominated by the defendant that it acts as a "mere department" of the defendant, service is defective, and here, Sonnenschein served Hemofarm Corporation located in D.C., and has failed to show that defendant so dominated Hemofarm Corporation as to meet the strict requirements.

Defendant also argues that plaintiff failed to satisfy CPLR 311 and thus, plaintiff's contentions regarding long arm jurisdiction are inapplicable. Plaintiff served an unauthorized third party when it improperly served a separate entity not authorized to accept process for defendant. For example, delivering the summons to a building receptionist, not employed by the defendant, without any inquiry as to whether the receptionist is a company employee, is not legally sufficient service of process. Such service cannot be upheld even though the receptionist may later deliver the summons to the proper party. Service of process pursuant to 311(a)(1) is defective where the person to whom the summons and complaint was delivered is neither an employee nor agent authorized by appointment or law to accept service on behalf of defendant.

Discussion

Defendant challenges jurisdiction based, in large part, on plaintiff's failure to comply with BCL 307(b). The Court notes that BCL § 307 does not apply to entities over which the Court lacks general or long-arm jurisdiction (*Bowman Import/export Ltd. v F.J. Elsner North*

Am. Ltd., 5 Misc 3d 1026, 799 NYS2d 158 [Sup Ct New York County 2004] citing *Wright v 299 Union Ave. Corp.*, 288 AD2d 382, 382 [2d Dept 2001] (stating that the "plain language of Business Corporation Law § 307(a) makes it applicable "(i)n any case in which a non-domiciliary would be subject to the personal or other jurisdiction of the courts of this state under [CPLR] article three"), *citing Lumbermens Mut. Cas. Co. v Borden Co.*, 268 F Supp 303, 307 [SDNY 1967] (BCL § 307(a) is solely a service statute); *East Continental Gems, Inc. v Yakutiel*, 153 Misc 2d 883, 582 NYS2d 594 [Sup Ct, New York County 1992] ("BCL Sec. 307(a) provides the manner of service upon a foreign corporation not authorized to do business in this state, *but, subject to our jurisdiction*)).

This is so because there "are two components or constitutional predicates of personal jurisdiction. The first component involves service of process and implicates the due process requirements of notice and opportunity to be heard . . . . The second component of personal jurisdiction, known as the jurisdictional basis, involves the power, or reach of a court over a party so as to bind that party to the court's determination. . . . These components are independent of one another in the sense that "service of process cannot by itself vest a court with jurisdiction over a non-domiciliary served outside New York State, however flawless that service may be" (*Hypo Bank Claims Group, Inc. v American Stock Transfer & Hypo Bank Claims Group, Inc. v American Stock Transfer & Trust Co.*, 4 Misc 3d 1020, 791 NYS2d 870 [Sup Ct, New York County 2004] *citing Keane v Kamin*, 94 NY2d 263, 265, 701 NYS2d 698 [1999] (internal citations omitted)).

Here, the primary basis for the Court's exercise of personal jurisdiction over defendant in this action is CPLR 302[a][1], which provides, in relevant part, that "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," with respect to a cause of action "arising from" such acts (*Humitech Dev. Corp. v Comu*, 16 Misc 3d 1109, 847 NYS2d 896 [Sup Ct, New York County 2007]). By this "single act statute ... proof of one transaction in New York is sufficient to invoke jurisdiction, 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 the transaction and the claim asserted." (*id citing Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]).

Here, it is uncontested that defendant retained plaintiff to perform legal services, worked with attorneys in plaintiff's New York office for nearly five years, and emailed plaintiff on many occasions. The record also indicates that defendant's employees visited New York in connection with the legal services provided by plaintiff (*see Fischbarg v Doucet*, 38 AD3d 270, 832 NYS2d 164 [1st Dept 2007] (defendants from California were subject to personal jurisdiction in New York pursuant to CPLR 302[a][1] in legal fee dispute, as defendants sought legal advice from plaintiff regarding an Oregon copyright case, by telephone calls, facsimile transmissions, mail and courier communications, on a consistent basis over a period of approximately one year]). Further, it cannot be contested that this action arises out of defendant's transaction of business in New York. Therefore, contrary to defendant's contention, the record sufficiently establishes that long-arm jurisdiction exists over defendant.

However, plaintiff failed to establish that it complied with the service of process provision of BCL §307(b).

Pursuant to BCL §307(b):

> Service of such process upon the secretary of state shall be made by personally delivering to and leaving with him or his deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, a copy of such process together with the statutory fee, which fee shall be a taxable disbursement. Such service shall be sufficient if notice thereof and a copy of the process are:
> (1) Delivered personally without this state to such foreign corporation by a person and in the manner authorized to serve process by law of the jurisdiction in which service is made, or
> (2) Sent by or on behalf of the plaintiff to such foreign corporation by registered mail with return receipt requested, at the post office address specified for the purpose of mailing process, on file in the department of state, or with any official or body performing the equivalent function, in the jurisdiction of its incorporation, or if no such address is there specified, to its registered or other office there specified, or if no such office is there specified, to the last address of such foreign corporation known to the plaintiff.

BCL § 307 "establishes a mandatory sequence and progression of service completion options to acquire jurisdiction over a foreign corporation not authorized to do business in New York. . . . [T]hese steps are 'requirements of a jurisdictional nature which must be strictly satisfied'" (*Stewart v Volkswagen of Am., Inc.*, 81 NY2d 203 [1993] *citing Flick v Stewart-Warner Corp.*, 76 NY2d 50, 54, 556 NYS2d 510).

Under BCL§ 307 (b)(2), espoused by plaintiff in its Affidavit of Compliance, plaintiff is obligated in the first instance to ascertain that there was no post office address specified for defendant to receive process or other registered or office address for defendant on file with the Serbia equivalent of the Secretary of State before descending to the next level of notification options, *i.e.*, mailing a copy of the process to "the last address [of defendant] known to the plaintiff" (BCL § 307[b][2] (*Stewart v Volkswagen of Am., Inc.*, 81 NY2d at 208).

Plaintiff herein established that it first attempted to serve defendant at its post office address specified for defendant to receive process or other registered or office address for

defendant on file with the Serbia equivalent of the Secretary of State Defendant. It is uncontested that defendant does not have an address specified for receipt of process on file with Department of State, or an address specified for receipt of legal process on file in the Republic of Serbia. The SBRA does not list an address for receipt of legal process, a registered office, or any other office for defendant. Thus, plaintiff was entitled to serve defendant at its last known address.

However, plaintiff failed to show that the address located in Washington D.C. was defendant's last known address (*see Stewart v Volkswagen of Am.*, 81 NY2d at 208 (holding that service under the "last known address" option, was not correctly utilized because plaintiffs "sent the copy of the process to VOA at its office in New Jersey 'on behalf of' VWAG because that was not VWAG's 'last known address,' as prescribed and contemplated by the statute, even if VOA is a mere department of VWAG"). Plaintiff's own invoices to defendant, on which this action is based, shows that the plaintiff possessed an address for defendant in Serbia. Therefore, plaintiff failed to establish that it mailed a copy of the process to "the last address" of defendant known to the plaintiff.

Notwithstanding plaintiff's failure to properly serve defendant pursuant to BCL § 307[b][2], contrary to defendant's contention, it cannot be said, at this juncture, that service upon Hemofarm Corporation in Washington D.C. was insufficient to constitute service upon defendant. It is well settled that in order for a subsidiary to be deemed the parent's involuntary agent for service, the subsidiary must be so dominated by its parent that it acts as its "mere department" or "mere instrumentality" (*Brandt v Volkswagen A.G.*, 161 AD2d 1149, 555 NYS2d 957 [4th Dept 1990]). There must be such complete control by the parent over the subsidiary that

it negates the conclusion that the subsidiary is operated as a separate and independent entity (*id.*). A finding of agency for jurisdictional purposes will not be inferred from the mere existence of a parent-subsidiary relationship (*Porter v LSB Indus., Inc.*, 192 AD2d 205, 600 NYS2d 867 [4th Dept 1993] *citing Frummer v Hilton Hotels Int.*, 19 NY2d 533, 538, 281 NYS2d 41, *rearg. denied* 20 NY2d 758, 283 NYS2d 1025, *cert denied* 389 US 923, 88 SCt. 241, 19 L Ed2d 266). In order for the subsidiary's activities to warrant the exercise of jurisdiction over the parent, the parent's control over the subsidiary's activities "must be so complete that the subsidiary is, in fact, merely a department of the parent" (*Porter, citing Delagi v Volkswagenwerk AG of Wolfsburg, Germany*, 29 NY2d 426, 432, 328 NYS2d 653, rearg. denied 30 NY2d 694, 332 NYS2d 1025 and *Taca Int. Airlines, S.A., v Rolls-Royce of England*, 15 NY2d 97, 99-102, 256 NYS2d 129 ["mere department", "division", "instrumentality", or "arm" of parent]). A subsidiary will be considered a "mere department" only if the foreign parent's control of the subsidiary is so pervasive that the corporate separation is more formal than real (*Porter,* citing *Heller & Co., Inc. v. Novacor Chemicals, Ltd.*, 726 F Supp 49, 54, affd. 875 F2d 856 [SDNY-applying New York law]).

"Generally, there are four factors used in determining whether a subsidiary is a mere department of the foreign parent: (1) common ownership and the presence of an interlocking directorate and executive staff; (2) financial dependency of the subsidiary on the parent; (3) the degree to which the parent interferes in the selection and assignment of the subsidiary's executive personnel and fails to observe corporate formalities; and (4) the degree of the parent's control of the subsidiary's marketing and operational policies" (*Volkswagenwerk Aktiengesellschaft v Beech Aircraft Corp.*, 751 F2d 117, 120-122 [2d Cir-applying New York law]).

Plaintiff submitted sufficient evidence indicating the possibility that the separate corporate entity Hemofarm Corporation was a wholly-owned subsidiary of the defendant, or was dominated by the defendant that it acts as a "mere department" or division of the defendant (*McHugh v International Components Corp.*, 118 Misc 2d 489, 461 NYS2d 166 [Sup Ct, Nassau County 1983] (Factual issues are presented however as to whether Marcon Japan and Marcon America "are one" for purposes of service of process)). Notwithstanding Babic's affidavit to the contrary, the record, including references in the emails to both Hemofarm Corporation and defendant, the internet presence, and that Hemofarm Corporation's president wrote to plaintiff on behalf of defendant, supports plaintiff's claim that discovery on the jurisdictional issues is warranted prior to dismissal of this action. Defendant should be permitted to seek documents and explore Babic's statements in further detail in order to ascertain whether Hemofarm Corporation was a wholly-owned subsidiary of the defendant, or was dominated by the defendant such that it acts as a "mere department" or "division" of the defendant. Thus, dismissal for lack of jurisdiction cannot be granted at this juncture.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant Hemofarm Konzern A.D. to dismiss the complaint for lack of personal jurisdiction is denied, at this juncture, without prejudice, to permit the parties conduct discovery on the issue of personal jurisdiction over defendant Hemofarm Konzern A.D.; and it is further

ORDERED that the parties shall complete discovery on the issue of personal jurisdiction over defendant Hemofarm Konzern A.D. within 60 days from the date of service of this order

with notice of entry; and it is further

ORDERED that defendant Hemofarm Konzern A.D. serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: July 27, 2010

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD