

**Spielman v Carrino**

2010 NY Slip Op 32290(U)

August 21, 2010

Supreme Court, Suffolk County

Docket Number: 38999-08

Judge: Thomas F. Whelan

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damages to the plaintiffs. In lieu of answering, defendant EFCA has moved for a dismissal of the plaintiffs' amended complaint on various grounds pursuant to CPLR 3211(a).

In support of its demands for dismissal on the grounds that the court lacks in personam jurisdiction over it, EFCA contends that it is a not-for-profit corporation organized under the laws of Minnesota. EFCA further contends that it is not present in New York and that it neither transacts nor conducts business here. To support these contentions, EFCA submits copies of its Article of Incorporation, its By Laws, and, among other things, an affidavit of Richard W. Dahl, EFCA's director of Human Resources. Dahl therein alleges that EFCA is in association of some 1400 churches and that its growing ministry extends to some 50 counties around the world. EFCA is further alleged *to consist* of churches of like faith and practice. Defendant, Grace Gospel Church of Suffolk, Inc. (hereinafter "Grace"), is one of twenty-eight churches in New York of such like faith and practice (*see* affid. of Richard W. Dahl, Ex. "J" of def's. moving papers).

The plaintiffs oppose the defendant's motion and point out that while Mr. Dahl, on behalf of EFCA, goes on to deny any meaningful presence in New York or that it has contacts, business relations or oversight with respect to defendant, Grace, EFCA's Articles of Incorporation, its By Laws and its website provide otherwise. Subparagraph "A" of Article II declares EFCA to be "an association and fellowship of autonomous but interdependent congregations of like faith and congregational government . . ." Subparagraph "B" of said Article provides that EFCA "through local churches, districts and national agencies shall pursue" nine enumerated objectives including the following:

2. To establish churches and related ministries and to organize and maintain evangelistic and disciple-making efforts in the United States and throughout the world.
3. To facilitate fellowship, harmony, and cooperation among local congregations and unite them for mutual ministries beyond the scope and ability of a local congregation standing alone, while respecting autonomy of such congregations, and, within that scope, to provide direction and coordination for local churches, districts, and national ministries that will best accomplish the purpose stated in paragraph A.
4. To educate and train vocational Christian workers and lay persons through the establishment and operation of institutions of higher learning and theological seminaries.
5. To credential and help to place pastors, missionaries, and other Christian workers and to hold them accountable for personal life and ministry.
6. To inform and motivate congregations and individuals for effective and responsible action on social issues, and to demonstrate the compassion of Christ through the establishment and operation of benevolent institutions.
7. To produce and distribute Christian literature and other resources to edify and equip the church and to proclaim the gospel to unbelievers.

Article IV of EFCA's Articles of Incorporation declares that EFCA shall consist of churches affiliated with it. Its By-Laws Article III(A) provides that ministries to the churches and cooperation

between the churches shall be accomplished through ministry groupings called Districts. Subparagraph (C) of Article III of the By-Laws states that a District represents EFCA to its member churches and, among other things, shall assist local churches and the Board of Ministerial Standing in matters of credentialing, discipline and restoration.

The Board of Ministerial Standing is an EFCA body comprised of the President of EFCA and others listed in subparagraph “D” of Article V of the By-Laws. It is responsible for credentialing throughout EFCA and for investigating and adjudicating all charges brought to it of doctrinal or moral error among ministers, and it shall prescribe appropriate discipline for those found guilty and times and means of restoration where possible. Subparagraph “D” of Article III of the By-Laws provides that a District is accountable to its member churches and that a District is accountable to the EFCA Board of Directors “to work interdependently (cooperating) with EFCA leadership in the establishment of District purposes objectives.”

The plaintiffs further contend that evidence of EFCA’s presence in New York is evident from other sources. The affidavit of Dahl submitted by EFCA in its supporting motion papers admits the employment of one person in New York. The self serving allegations regarding the limited role of that employee coupled with the conclusory allegations regarding autonomy and the separate and distinct corporate structure of EFCA are alleged to be insufficient to non-suit the plaintiffs. The plaintiffs also assert that EFCA’s website supplies further evidence of its presence here in New York. Thereon, EFCA advertises an EFCA church location in Patchogue, New York, at the address of defendant, Grace Gospel Church. Listed on the website are 21 services provided by EFCA to its churches including: consulting for churches... consulting for church governance, development and transition..... comprehensive church planting assistance and support....conducting pastoral installation ceremonies..... and personal counseling of pastors. The plaintiffs thus argue that there is sufficient evidence of EFCA’s presence and contacts in New York to support the exercise of personal jurisdiction over it by this court

It is well established that to defeat a motion to dismiss, a plaintiff need only demonstrate that facts may exist to exercise personal jurisdiction over the defendant (*see Ying Jun Chen v Lei Shi*, 19 AD3d 407, 796 NYS2d 126 [2d Dept 2005]). It is equally well established that the court has general jurisdiction over non-domiciliaries pursuant to CPLR 301 where such a non-domiciliary defendant’s contacts with this state, even though unrelated to the cause of action, are continuous systematic and substantial (*see Landoil Resources Corp. v Alexander & Alexander*, 77 NY2d 28, 563 NYS2d 739 [1990]; *Laufer v Ostrow*, 55 NY2d 458, 449 NYS2d 456 [1987]). For jurisdiction to attach under CPLR 301, it must appear that the defendant is “present” in the state, not occasionally or casually, but with a fair measure of permanence (*see Landoil Resources Corp. v Alexander & Alexander*, 77 NYS2d 28, *supra*). A finding of doing business pursuant to CPLR 301 may be based upon an affiliate relationship between the non-domiciliary defendant and a domiciliary corporation performing the work of the non-domiciliary defendant here, as it gives rise to an inference of an agency relationship between the two (*see Frummer v Hilton Hotels, Int.*, 19 NY2d 553, 281 NYS2d 41 [1967]).

Under the agency theory, EFCA would be subject to suit in New York pursuant to CPLR 301 if the relationship between it and defendant Grace gives rise to a valid inference of an agency relationship. In other words, this court could properly exercise personal jurisdiction over EFCA if defendant Grace was doing business here on behalf of EFCA (*see Wiwa v Royal Dutch Petroleum Co.*, 226 F3d 88 [2d Cir. 2000]; *Ball v Metalugie \_ Hoboken \_ Over Port, SA*, 1989 WL 87418 [ND NY 1989]). To sustain such a finding of jurisdiction, it must appear that the business activities of the domiciliary corporation are sufficiently important to the foreign corporation that such corporation, itself, would perform equivalent services if no agent were available (*see Wiwa v Royal Dutch Petroleum Co.*, 226 F3d 88, *supra*). It is only where the two entities are truly separate corporate entities and operate independently will the agency theory not apply (*see e.g. Delagi v Volkswagenwenk*, 29 NY2d 426, 318 NYS2d 653 [1972]).

In addition to the exercise of jurisdiction over non-domiciliary defendants under the traditional basis provided by CPLR 301, New York's Long Arm Statute set forth at CPLR 302 provides additional bases for the exercise of personal jurisdiction over non-domiciliary defendants. Under this long arm statute, a non-domiciliary defendant will be subject to the jurisdiction of a New York court in actions involving torts committed within or without the state by the non-domiciliary defendant, in person or through an agent, provided certain circumstances exist (*see* CPLR 302[a][2]; [3]).

Furthermore, a non-domiciliary may be subject to personal jurisdiction where it personally, or through an agent, transacts any business within the state or contracts anywhere to supply goods and services in this state (*see* CPLR 302[a][1]; *Bogal v Finger*, 59 AD3d 653, 874 NYS2d 217 [2d Dept 2009]). Known as a single transaction statute, CPLR 302(a)(1) may provide jurisdiction over a non-domiciliary defendant although it never entered New York. Proof of one transaction in New York is sufficient to invoke jurisdiction under CPLR 302(a)(1) so long as the defendant's activities were purposeful and there is a substantial nexus between the transaction and the claim asserted (*see Grimaldi v Quinn*, 72 AD3d 37, 895 NYS2d 156 [2d Dept 2010]). It is the quality of the defendant's contacts that establish a transaction of business in New York within the contemplation of CPLR 302(a)(1) (*see Fishburg v Doucet*, 9 NY3d 375 at 380-381; 849 NYS2d 501 [2007]). The purposeful creation of a continuing relationship is an important factor in determining a claim for long arm jurisdiction under CPLR 302(a)(1) (*see Grimaldi v Quinn*, 72 AD3d 37, *supra*).

Here, the court finds that the plaintiffs sufficiently established that material facts exist upon which court may properly exercise personal jurisdiction over moving defendant EFCA (*see Tucker v Sanders*, 75 AD3d 1096, 904 NYS2d 618 [2d Dept 2010]). The record is replete with evidence of EFCA's purposeful creation of a continuing relationship with Grace and with defendant Eastern District of Evangelical Fee Church of America, so as to warrant this court's exercise of personal jurisdiction over EFCA pursuant to CPLR 302(a)(1). The record further contains ample evidence that EFCA's contacts with this state, through the 29 affiliated churches situated here which subscribe to EFCA's ministry of faith, customs and practices, are sufficiently continuous, systematic and substantial so as to warrant the invocation of personal jurisdiction over EFCA in this action pursuant to CPLR 301. Those portions of EFCA's motion wherein it demands dismissal of the plaintiffs' complaint pursuant to CPLR 3211(a)(8) are thus denied.

The remaining portions of EFCA's motion, wherein it seeks dismissal of the plaintiffs' complaint pursuant to CPLR 3211(a)(1) and 3211(a)(7), are also denied. It is well established that for a complaint to be dismissed pursuant to CPLR 3211(a)(1), the documentary evidence submitted must resolve all factual issues, as a matter of law, and conclusively dispose of the plaintiffs' claims (*see Hensdorf v Bernand Janowitz Constr. Corp.*, 67 AD3d 640, 889 NYS2d 600 [2d Dept 2009]). To be considered documentary evidence within the contemplation of CPLR 3211(a)(1), the documentation must be unambiguous and of undisputed authority (*see Springer v Almontaser*, 75 AD3d 539, 904 NYS2d 768 [2d Dept 2010]). An affidavit does not constitute documentary evidence (*see Fonteneha v John Doe 1*, 73 AD3d 78, 898 NYS2d 569 [2d Dept 2010]). The papers submitted by EFCA did not sufficiently refute the material facts alleged in the complaint which charge EFCA with liability for tortious conduct committed by it and/or by others for whom EFCA may be vicariously liable under agency or other theories.

Nor did the moving papers establish that the plaintiffs' complaint is legally insufficient. In considering a motion to dismiss pursuant to CPLR 3211(a)(7), the court must afford the complaint a liberal construction and determine only whether the facts, as alleged, fit within any cognizable legal theory (*see Reiver v Burkhardt, Wexler & Hirschberg, LLP*, 73 AD3d 1149, 901 NYS2d 690 [2d Dept 2010]). If the court can determine that the plaintiff is entitled to relief on any view of the facts alleged, its inquiry is complete and the complaint must be declared legally sufficient (*see Symbol Tech. v Deloitte & Touche, LLP*, 69 AD3d 191, 888 NYS2d 538 [2d Dept 2009]). Here, a review of the plaintiffs' amended complaint

reveals that it contains allegations sufficient to state viable claims of breaches of fiduciary duties and other duties owing to the plaintiffs from the moving defendant or from the other church defendants, for which EFCA may be held vicariously liable. The complaint alleges that agency relationships exist between all of the church defendants and Carrino, an employee pastor of Grace at the time of the tortious acts. For these reasons and those set forth in the court's August 4, 2009 order, wherein it sustained as legally sufficient the plaintiffs' claims against defendant Grace, the court finds that the plaintiffs' amended complaint is not subject to dismissal pursuant to CPLR 3211(a)(7).

In view of the foregoing, this motion by EFCA to dismiss the plaintiffs' amended complaint is denied.

DATED: 8/2/10

  
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THOMAS F. WHELAN, J.S.C.