Scan

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

---x

ROBERT KAPRALL,

Plaintiff,

-against-

WE: WOMEN'S ENTERTAINMENT LLC, PEGGY WILLENBERG, MELANIE METZ TROCKMAN and UPPER-MIDWEST STORM TOURS, LLC,

Defendants.

---x

TRIAL/IAS PART: 22
NASSAU COUNTY

Index No: 021840-07
Motion Seq. No: 2
Submission Date: 7/21/10

The following papers have been read on this motion:

Notice of Motion, Affirmation in Support,
Affidavits in Support (2) and Exhibits.....x
Defendants' Memorandum of Law in Support.....x
Affirmation in Opposition and Exhibits.....x
Plaintiff's Memorandum of Law in Opposition.....x
Defendants' Reply Memorandum of Law.....x
Letter dated July 15, 2010.....x
Letter dated July 16, 2010 and Enclosure.....x

This matter is before the Court for decision on the motion filed by Defendants Peggy Willenberg ("Willenberg"), Melanie Metz Trockman ("Trockman") and Upper-Midwest Storm Tours, LLC ("Storm Tours") (collectively "Minnesota Defendants") on October 1, 2008 and submitted on July 21, 2010. [1] In their motion, Defendants seek reargument of the portion of the

[1] This matter was stayed subsequent to the issuance of the Original Decision by Justice Austin. This Court assumed responsibility for this matter in May of 2009 and the stay was lifted on or about July 2, 2010. At that time, the Court permitted counsel for the parties to submit letters outlining their positions on the personal jurisdiction issue, and the Court has reviewed those letters.

decision of the Honorable Leonard B. Austin dated August 7, 2008 ("Original Decision") that denied the motion of the Minnesota Defendants to dismiss the Complaint. Although the Minnesota Defendants initially sought renewal and reargument of their motion on the grounds of documentary evidence and lack of personal jurisdiction, their motion is now based solely on the grounds of lack of personal jurisdiction. For the reasons set forth below, the Court grants renewal and reargument and, upon that renewal and reargument, denies the motion of the Minnesota Defendants in its entirety.

BACKGROUND

A. Relief Sought

The Minnesota Defendants move for an Order, pursuant to CPLR § 2221, granting leave to renew and reargue Defendants' motion to dismiss the Complaint for lack of personal jurisdiction.

Plaintiff Robert Kaprall ("Plaintiff") opposes Defendants' motion.

B. The Parties' History

The background of this matter is set forth in detail in the Original Decision and the Court incorporates that Original Decision herein by reference. That Prior Decision outlines the history of this case, which involves an agreement between Plaintiff, a producer of television shows, and Defendants to create a television series based on tours of extreme weather, including tornadoes and hurricanes. Defendants Willenberg and Trockman, residents of Minnesota, are trackers of extreme weather and are known as the "Twister Sisters." Willenberg and Trockman conduct guided automobile tours to track and pursue extreme weather for Storm Tours. WE is a television network and domestic corporation whose principal place of business is in within Nassau County, New York.

In the Original Decision, Justice Austin addressed the issue of whether New York could properly exercise long-arm jurisdiction over the Minnesota Defendants. Justice Austin outlined the relevant law and concluded as follows:

> Although the Minnesota Defendants did not physically conduct business in New York, the facts are sufficient to establish personal jurisdiction over them. The Minnesota Defendants currently produce a television show that is broadcast by WE. The production of this show is the result of an agreement between the

> Minnesota Defendants, and a third-party known as Original Productions LLC ("Original Productions), which is not named in this action. Original Productions was vested with the authority to act on behalf of the Minnesota Defendants as their agent, to form an agreement to produce the series.
>
> The Minnesota Defendants then acted through Original Productions to purposefully avail themselves of the benefits of the State of New York, by conducting business with WE. See, Kreutter v. McFadden Oil Corp., [71 N.Y.2d 460, 467 (1988] (holding that long-arm jurisdiction may be established through agency theory where purposeful activities related to the cause of action were conducted in the state with the knowledge and consent of the defendant and where the defendant exercised some control over the agent). Original Productions transacted business with WE, with the knowledge and consent of the Minnesota Defendants. The causes of action asserted by [Plaintiff] are related to this transaction. Finally, the Minnesota Defendants exercised control over Original Productions as evidenced by their exclusive rights agreement. Accordingly, invoking of long-arm jurisdiction over the Minnesota Defendants is proper.
>
> (Orig. Dec. at pp. 8-9).

In her Affidavit in Support of the instant motion, Willenberg affirms as follows:

With respect to the distribution of the WE "Twister Sisters" program, the Minnesota Defendants "entered into an arms-length Talent Agreement in the State of Minnesota with [Original Productions]" (Willenberg Aff. at ¶ 2). None of the Minnesota Defendants ever gave Original Productions any instructions regarding distribution of the Twister Sisters program, and the Minnesota Defendants were unaware of negotiations, or the terms of the agreement, between Original Productions and WE.

In his Affidavit in Support of the instant motion, Ernest Avila ("Avila") affirms as follows:

Avila is the Chief Operating Officer of Original Productions, a California television production company that produces and distributes reality-based television shows for public distribution. None of the Minnesota Defendants ever served as an officer or employee of Original Productions. Avila provides documentation (Ex. A to Avila Aff.) reflecting that the Minnesota Defendants were also never business partners or sponsors of Original Productions.

Avila submits that Original Productions did not act as agents for the Minnesota Defendants. Rather, Original Productions negotiated and entered into "arms-length Talent

Agreements with the Minnesota Defendants" (Avila Aff. at ¶ 7). Avila provides copies of the Talent Agreements (Ex. B to Avila Aff.) between Original Productions, and Storm Tours, Willenberg and Metz dated March 28 and April 3, 2007. Prior to those dates, Original Productions, "on its own behalf" (Avila Aff. at ¶ 9), negotiated and entered into a distribution agreement with WE.

Avila affirms that the Minnesota Defendants were not involved in these negotiations, did not have control over Original Productions, and were not involved in selecting WE or determining the final terms of Original Production's agreement with WE. In support, Avila provides a redacted copy of the agreement between Original Productions and WE dated December 26, 2006 and notes certain relevant aspects of that agreement including 1) Original Productions had the sole discretion to determine the Minnesota Defendants' screen credits; and 2) Original Productions would be the sole and exclusive owner of the results of the Minnesota Defendants' services, including all copyrights.

Avila avers that the Talent Agreements are the only agreements that Original Productions entered into with the Minnesota Defendants. Avila also directs the Court's attention to the provision on page 5 of Original Productions' agreement with WE providing as follows:

> The initial and any subsequent production order hereunder shall be contingent upon Producer [Original Productions] engaging and securing the services of Peggy Willenberg and Melanie Metz in connection with the Series, upon terms and conditions to be approved by WE, such approval to be exercised in good faith.

Avila submits that the foregoing clearly demonstrates that Original Productions did not act as agent for the Minnesota Defendants.

C. The Parties' Positions

The Minnesota Defendants submit that the Court should grant their motion because Plaintiff failed to meet his burden of establishing jurisdiction. The Minnesota Defendants argue that the Original Decision is erroneous, *inter alia*, because Justice Austin mistakenly adopted Plaintiff's allegation that the Minnesota Defendants acted through Original Productions, as their agent, to purposefully avail themselves of the benefits of New York by conducting business with WE, notwithstanding Plaintiff's failure to provide support for its allegation of an agency relationship.

The Minnesota Defendants also contend that the Court should grant its motion because there are facts, not offered at the time of the original motion, that would change the prior determination, and the Minnesota Defendants have a reasonable justification for their prior non-disclosure. Specifically, neither the Complaint, nor Plaintiff's opposition to the initial motion, provided any support for the purported agency relationship between Original Productions and the Minnesota Defendants. Thus, there was no basis for the Minnesota Defendants to address Plaintiff's "naked allegation" (Memorandum of Law in Support at p.12) in the Complaint that Defendants Willenberg and Trockman, "directly or through an agent" sold the Program to WE, without identifying Original Productions. The Minnesota Defendants now ask the Court to consider the Talent Agreements which, they submit, confirm that Original Productions has never been an agent of Willenberg, Trockman or Storm Tours. In addition, the agreement between Original Productions and WE was signed three months before the Talent Agreements and required Original Productions to engage the services of the Minnesota Defendants. The Minnesota Defendants submit that this documentation refutes the agency theory that was central to Justice Austin's determination in the Original Decision that New York properly exercised personal jurisdiction over the Minnesota Defendants.

Plaintiff oppose the motion of the Minnesota Defendants, submitting that 1) the allegedly new facts on which they base their motion were available to them when they filed their initial motion; 2) the Minnesota Defendants were on notice of Plaintiff's claim of an agency relationship in light of, *e.g.*, a) language in paragraph 39 of the Complaint alleging that Willenberg and Trockman acted directly or through an agent, and b) affidavits submitted by Willenberg and Trockman in opposition to the original motion (Exs. B and C to Aff. in Opp.) that discussed the relationship between Storm Tours and Original Production; and 3) the documentary evidence, and reasonable inferences drawn from that evidence, supports Justice Austin's conclusion in the Original Decision that Original Productions aced as agent for the Minnesota Defendants in contracting with WE.

Paragraph 39 of the Complaint (Ex. D to Aff. in Opp.) alleges as follows:

> Thereafter, and during the Exclusivity Period, Willenberg and Trockman, directly or through an agent, without Plaintiff's knowledge or consent, sold the Program Concept to WE to develop into a reality based series; although, in an attempt to deceive Plaintiff and to deprive Plaintiff of his rights under the Agreement, and in violation of his exclusive ownership of the Program Concept, said parties may have delayed entering into a formal agreement until after the expiration of the Agreement.

In their Reply Affirmation, the Minnesota Defendants submit, *inter alia*, that the Prior Decision did not address Plaintiff's failure to satisfy his burden of proof to establish jurisdictional facts and, for this reason, the Court should grant reargument and dismiss the Complaint against the Minnesota Defendants for lack of personal jurisdiction.

In his July 15, 2010 letter to the Court, counsel for the Minnesota Defendants outlines and expounds on their claims, as discussed *supra*, that 1) the Minnesota Defendants had a reasonable justification for not previously submitting these arguments to the Court; and 2) the submitted documents refute Plaintiff's claim of an agency relationship which is the only theory that could justify the exercise of New York jurisdiction over the Minnesota Defendants.

In his July 16, 2010 letter to the Court, counsel for Plaintiff submits that the instant motion is moot in light of the decision of the Appellate Division, Second Department in *Kaprall v. WE et al.*, 74 A.D.3d 1151 (2d Dept. 2010) affirming the Original Decision. Counsel for Plaintiff also outlines and expounds on Plaintiff's claims, as discussed *supra*, that 1) the purportedly new evidence on which the Minnesota Defendants now rely was available to them when they filed the initial motion; 2) the Minnesota Defendants were aware of the agency issue in light of relevant allegations in the Complaint and the original motion papers; and 3) the Minnesota Defendants are propounding the same arguments set forth in their original motion.

RULING OF THE COURT

Pursuant to CPLR § 2221(d)(2), a motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion. Pursuant to CPLR § 2221(e)(2), a motion for leave to renew shall be based upon new facts not offered on

the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination.

It is well settled that a motion for reargument is addressed to the sound discretion of the Court, and may be granted upon a showing that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law. *McGill v. Goldman*, 261 A.D.2d 593, 594 (2d Dept. 1999). It is not designed, however, to provide an unsuccessful party with successive opportunities to reargue issues previously decided or to present arguments different from those originally presented. *Id.*; *Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dept. 1992).

Although a motion for leave to renew generally must be based on newly-discovered facts, this requirement is a flexible one, and a court has the discretion to grant renewal upon facts known to the movant at the time of the original motion, provided that the movant offers a reasonable justification for the failure to submit the additional facts on the original motion. *Smith v. State of New York*, 71 A.D.3d 866, 867-868 (2d Dept. 2010), quoting *Allstate Ins. Co. v. Liberty Mut. Ins.*, 58 A.D.3d 727, 728 (2d Dept. 2009). Leave to renew, however, is not freely given to a party who has not exercised due diligence in making the initial factual presentation. *Smith v. State of New York*, *supra*, at 868.

The Court concludes that, in light of relevant allegations in the Complaint, including those in paragraph 39, and the submissions in connection with the original motion, the Minnesota Defendants were aware that Plaintiff was claiming a potential agency relationship between the Minnesota Defendants and other relevant entities. Thus, the Minnesota Defendants have not demonstrated a reasonable justification for their failure to present the relevant documentation in connection with their original motion.

Even assuming, *arguendo*, that the Court were to consider the additional submissions of the Minnesota Defendants, the Court concludes that those submissions would not change the prior determination as set forth in the Original Decision. Moreover, Defendants have not demonstrated that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law. In the Original Decision, Justice Austin discussed the background of this matter at length, including the interactions of the relevant parties, and set forth the basis

for his conclusion that the requisite agency relationship existed. The documentation submitted by the Minnesota Defendants in support of the instant motion is not inconsistent with that conclusion, and, accordingly, the Court denies the motion of the Minnesota Defendants in its entirety.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

Counsel are reminded of their required appearance at a conference before the Court on October 7, 2010 at 9:30 a.m.

ENTER

DATED: Mineola, NY
September 9, 2010

HON. TIMOTHY S. DRISCOLL
J.S.C.