

Poten & Partners, Inc. v Greco

2011 NY Slip Op 34008(U)

October 4, 2011

Sup Ct, New York County

Docket Number: 600895/10

Judge: Barbara R. Kapnick

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

PRESENT: **BARBARA R. KAPNICK**
J.S.C.

PART 39

Index Number : 600895/2010
POTEN & PARTNERS INC
vs
GRECO, JR, RICHARD
Sequence Number : 001
DISM ACTION/ INCONVENIENT FORUM

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

Dated: 10/4/11


BARBARA R. KAPNICK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39**

-----X

POTEN & PARTNERS, INC.,

Plaintiff,

- against -

DECISION/ORDER

Index No. 600895/10
Motion Seq. No. 001

RICHARD GRECO, JR., FILANGIERI ADVISORY CORPORATION, FILANGIERI CAPITAL PARTNERS, COLUMBUS CAPITAL FUND, NINEPOWER CORP., MARCO IORI, MARCO BERTETTI, PIERLUIGI SERRA and ENTITIES A TO Z, whose names are currently unknown to the plaintiff but are intended to be entities that are the "Solar Companies" as set forth herein,

Defendants.

-----X

BARBARA R. KAPNICK, J.:

This action arises out of the alleged misconduct, malfeasance, collusion, fraud and conspiracy of defendants, including but not limited to plaintiff Poten & Partners', Inc. ("PPI's"), former employee, Richard Greco, Jr. ("Greco") and the remaining defendants, PPI's investment partners, to deprive PPI of monies, equity, control, services and various investment opportunities.

Background

According to the Verified Complaint, PPI is a global broker and commercial advisor for the energy and ocean transportation industries. In or around May and June 2009, PPI recruited defendant Greco to manage its capital services department based, in part, on his experience managing defendant Filangieri Advisory

Corp. ("Filangieri"), a small merchant bank. On or about June 19, 2009, Greco accepted PPI's offer of employment and executed an employment agreement. On or about August 17, 2009, Greco executed additional agreements, including confidentiality, non-competition and non-solicitation agreements, in connection with his impending employment. On or about September 8, 2009, Greco commenced his work at PPI.

At the end of September 2009, PPI learned that Greco had a 25% interest in one or more companies (the "Solar Companies"), which were developing solar power projects in Italy ("Solar Project") and that Greco had shared ownership in the Solar Companies with defendants Marco Iori ("Iori"), Marco Bertetti ("Bertetti") and Pierluigi Serra ("Serra").

On or about and between September 28 and 30, 2009, Greco first informed PPI about the Solar Project, explaining that the government of Italy had authorized the use of solar power in the country's electric grid. PPI responded that pursuant to the terms of his employment agreement, he was required to be working on PPI projects. PPI also told Greco that he owed them a duty of loyalty and that he had to ensure that he would represent PPI's interest when working on the Solar Project.

On or about November 5, 2009, PPI, Greco, Iiori, Bertetti, Serra and defendant Columbus Capital Fund ("CCF") met in New York to discuss the Solar Project. PPI and Greco subsequently entered into an agreement, dated November 10, 2009, (the "November Agreement") addressing the time, expense and conflicts of interests associated with Greco's individual interest in the Solar Project.

According to the Verified Complaint, pursuant to the November Agreement defendants caused PPI to continue to invest in the Solar Project, including a solar project in Uta, Italy (the "Uta Project"). PPI continued to invest in these projects until February 2010, when Greco disclosed to PPI that CCF and the other defendants had not in fact developed the Uta Project as they had previously represented to PPI.

On or about March 4, 2010, PPI rejected Greco's attempt to renegotiate the defendants' agreements with PPI by offering to transfer a certain percentage of its interest to a different company. On or about March 10, 2010, PPI terminated Greco's employment "for cause" based on his acts and omissions during his employment.

Plaintiff commenced the instant action containing fourteen causes of action on or about April 8, 2010. However, only the

following three causes of action are pled against the moving defendant Serra:

- (1) fraud based on the false representations made by Serra regarding the nature and quality of the Solar Project as an investment (tenth cause of action);
- (2) interference with PPI's contract with Greco (twelfth cause of action); and
- (3) a declaratory judgment granting PPI a 40% interest in the Solar Companies and a controlling interest in the Solar Project (fourteenth cause of action).

Serra now moves for an order pursuant to CPLR 3211(a)(8), (7), (1) and (2), dismissing plaintiff's Verified Complaint, insofar as it is pled against him, on the grounds of:

- (1) lack of personal jurisdiction; or, in the alternative;
- (2) failure to state a cause of action for fraud and/or interference with contract;
- (3) a defense is founded upon documentary evidence; and
- (4) lack of subject matter jurisdiction.

Plaintiff opposes defendant Serra's motion and cross-moves for leave to conduct jurisdictional discovery pursuant to CPLR 3211(d).

Discussion

Personal Jurisdiction

In paragraph 10 of the Verified Complaint, PPI alleges that "[u]pon information and belief, defendant Pierluigi Serra [] was and is an individual residing in the Country of Italy and who regularly conducts business in the State of New York."

Serra has submitted an Affidavit in support of his motion stating that he is an Italian citizen, who resides in Italy and is not domiciled in the State of New York, and, therefore, is not subject to personal jurisdiction in New York, unless plaintiff can demonstrate that New York's long-arm statute confers jurisdiction over him by reason of his contacts within the State. *Copp v. Ramirez*, 62 AD3d 23, 28 (1st Dep't 2009), *lv denied* 12 NY3d 711 (2009). While "[t]he burden rests on plaintiff[], as the part[y] asserting jurisdiction," *Id.*, to defeat a pre-answer motion to dismiss, a plaintiff "need only demonstrate that facts 'may exist' to exercise personal jurisdictional over the defendant." *Brinkmann v. Adrian Carriers Inc.*, 29 AD3d 615, 616 (2d Dep't 2006); *Peterson v. Spartan Industries, Inc.*, 33 NY2d 463, 467 (1974). If plaintiff fails to do so, however, or presents only a frivolous basis for personal jurisdiction, plaintiff is not entitled to discovery under CPLR 3211(d). *Peterson, supra* at 467.

CPLR 302(a)(1), which plaintiff argues is the basis for personal jurisdiction here, provides as follows:

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state;

It is well settled under New York law that:

Under CPLR 302(a)(1), . . . long-arm jurisdiction over a non-domiciliary exists where a defendant transacted business within the state, and the cause of action arose from that transaction. "If either prong of the statute is not met, jurisdiction cannot be conferred" (citation omitted). Under the statute, "proof of one transaction in New York is sufficient to invoke jurisdiction . . . so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" (citation omitted). "[J]urisdiction is not justified where the relationship between the claim and transaction is too attenuated" (citation omitted).

Copp v. Ramirez, supra at 28. "Purposeful activities are those with 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 its laws.'" *Fischbarg v. Doucet*, 9 NY3d 375, 380 (2007) (internal citation omitted).

Moreover, even if the out-of-state defendant's contacts with New York fall within the long-arm statute, the exercise of jurisdiction must also comply with due process. *Copp v. Ramirez*, *supra* at 30.

Due process is satisfied if (1) defendants had "minimum contacts" with New York State so they could reasonably foresee defending a suit here, and (2) the prospect of defending a suit in New York State comports with "traditional notions of fair play and substantial justice" (citations omitted). In determining the second prong of the test, "[a] court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief" (citation omitted), as well as "the interstate judicial system's interest in obtaining the most efficient resolution of controversies" (citation omitted).

Id. at 30-31.

According to the Verified Complaint and the Affidavit of Steven M. Garten, the Chief Operating Officer of PPI, sworn to on September 7, 2010,¹ plaintiff relies on the following acts as the basis of jurisdiction:

- (1) the November 5, 2009 Power Point presentation presented

¹ In determining a motion to dismiss, "the court may freely consider additional facts contained in affidavits submitted by the plaintiff to remedy any defects in the complaint (citation omitted). The allegations in the complaint, and in any supporting affidavit, must be taken as true, and the plaintiff must be accorded the benefit of every possible favorable inference (citations omitted)." *Sheridan v. Carter*, 48 AD3d 444, 445 (2d Dep't 2008).

to PPI at its New York offices, which explained that Serra and the other partners of CCF would each contribute 5% of their ownership in exchange for PPI's support of the Solar Project²;

- (2) Serra's attendance at the meeting held first at Smith & Wollensky's Steakhouse and then at PPI's offices in New York on November 24, 2009, during which the defendants, including Serra, described the status of the Solar Project authorizations for the production of electricity in Italy and the relationships with the farmers whose land the photovoltaic plants would be built upon;
- (3) Serra's attendance at the November 25, 2009 meeting, also held in PPI's offices in New York, in connection with the creation of an information memorandum for the Solar Project and the status of the project in Uta, Italy;
- (4) the January 18, 2010 meeting at PPI's offices in New York, which was attended by Serra by teleconference, and again addressed the Solar Project; and
- (5) the January 25, 2010 meeting at PPI's offices in New York, which was attended by Serra, again by teleconference, regarding the sale of the Solar Project

² There are no allegations in the Complaint that Serra was physically present in New York for the November 5, 2009 meeting, just that the power point contained representations made on his behalf.

authorizations.

Moreover, in supplemental papers submitted with the Court's permission, plaintiff asserts that Serra engaged in regular email communications with Greco, at his PPI email address, regarding the Solar Project and its progress. Plaintiff also attaches numerous exhibits, which support plaintiff's assertions regarding Serra's involvement in the Solar Project.

In the Affidavit of Serra in Reply to Plaintiff's December 29, 2010 Submission, Serra states that ". . . it was not clear to [him] on whose behalf Mr. Greco was acting, as Mr. Greco acted as a promoter of various entities, including through his company Filangieri Advisory and Filangieri Capital Partners" Moreover, Serra maintains in his original and supplemental submissions, that he does not speak, understand or write the English language, therefore his participation in any meetings or conference calls, conducted in English, was merely a formality and cannot amount to purposeful connections to this State.

Based on the papers submitted and the oral argument held on the record, on November 16, 2010, this Court cannot determine conclusively whether it may exercise long-arm jurisdiction over Serra. Given Serra's representations that he does not speak the

English language, it is unclear whether his presence at the meetings in New York, alone, is enough to confer jurisdiction. Moreover, although plaintiff has put forward evidence of Serra's communications with Greco and others involved in the Solar Project, it is unclear whether Serra was "purposefully availing" himself of the benefits of this State in those communications, given Serra's representation that he was not always aware that Greco was affiliated with PPI. There are not enough facts before this Court to make a determination as to the "quality" of Serra's activities, whether they were "purposeful" or whether he "could reasonably foresee defending a suit here." The Court finds, however, that plaintiff has made a "sufficient start" in showing that facts may exist regarding Serra's activities, which would allow this Court to exercise personal jurisdiction over him.

Accordingly, Serra's motion to dismiss for lack of personal jurisdiction is denied without prejudice and plaintiff's cross-motion for leave to conduct limited jurisdictional discovery pursuant to CPLR 3211(d) is granted.

Since discovery is needed to determine whether this Court has personal jurisdiction over Serra, the Court will not reach the other grounds for dismissal raised by defendant in his motion.

The parties are directed to meet and confer as to the parameters of jurisdictional discovery necessary and to appear for a conference in IA Part 39, 60 Centre St., Room 208 on November 16, 2011 at 10:00 A.M.

This constitutes the Decision and Order of this Court.

Dated: *Oct 4*, 2011



BARBARA R. KAPNICK
J.S.C.

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