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SHORT FORM ORDER

INDEX No. 11-35598

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 45 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 3/9/12
ADJ. DATES 4/13/12
Mot. Seq. # 001 - MG
CDISP Y____ N x

SALVATORE CARUCCI,

Plaintiff,

-against-

NACIREMA ENVIRONMENTAL SERVICES, INC., THE PROVIDENT BANK, ANTHONY NOVELLO a/k/a ANTHONY NOVELLO, JR., JOHN P. CHERCHIO, MAUTONE & HORAN, PA and M ICHAEL J. PARLAVECCHIO,

Defendants.

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Upon the following papers numbered 1 to 9 read on this motion to dismiss ; Notice of Motion/Order to Show Cause and supporting papers 1 - 4 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 5-6 ; Replying Affidavits and supporting papers 7-8 ; Other 9 (memorandum) ; (~~and after hearing counsel in support and opposed to the motion~~) it is

ORDERED that this motion (#001) by defendant, Provident Bank, for an order dismissing so much of the plaintiff's complaint that asserts claims against the moving defendant is considered under CPLR 3211(a)(8) and 3211(a)(1) and (5) and is granted.

This action arises out of the plaintiff's December 28, 2007 execution of a written guaranty of the payment and performance of the obligations of defendant, Nacirema Environmental Services, Inc. (hereinafter "NE") under terms of a Loan and Security Agreement and other loan documents by which NE was extended loans and other forms of credit by defendant Provident Bank. The credit extended to NE by Provident Bank on December 28, 2007 included a loan in the amount of $2,000,000.00, a revolving credit equipment loan in the amount of $1,000,000.00 and a term loan in the amount of $1,250,000.00 for a total loan package in the aggregate amount of $4,250,000.00. In addition to the Loan

and Security Agreement of December 28 2007, the loans and collateral pledges are evidenced by promissory notes, security agreements and written guarantees, including that of the plaintiff.

On that same date, NE's affiliated corporation, Nacirema Industry Inc. [hereinafter "NI"] received similar revolving credit and equipment loans totaling $4,500.000.00 and a term loan in the amount of $2,750,000.00 from defendant Provident Bank under the terms of the same December 28, 2007 Loan and Security Agreement that governed the December 28, 2007 loans to NE. Both NE and NI are New Jersey corporations engaged in the business of construction demolition. The loans to NI were separately guaranteed in writing by defendants, Anthony Novello and John P. Cherchio, and such guarantees included further guarantees of the obligations of NE under its promissory notes and other loan documents. The plaintiff is allegedly a shareholder of NE but not of NI. These facts are advanced by the plaintiff in an attempt to explain the reason he guaranteed only the obligations of NE and not those of NI (*see* ¶ 38 of the plaintiff's complaint).

The original Loan and Security Agreement of December 28, 2007 and certain other of the original loan documents pertaining to NI were the subject of a First Amended and Restated Loan and Security Agreement in July of 2008. This agreement enlarged the credit extended to NI under the original revolving credit loan from $3,000,000.00 to $4,500,000.00 and it provided a new term loan in favor of NI in the amount of $2,5000,000.00. Among the other documents executed in connection therewith was a First Amended Restated Guaranty of Payment executed by guarantors, Novello and Cherchio, and NE and NI (*see* ¶ 43 of the plaintiff's complaint).

The execution of a Second Amended and Restated Loan and Security occurred on March 31, 2009. It effected modifications to NI's First Amended and Restated loan documents and to NE's original loan documents and obligations thereunder. According to the plaintiff, the alleged purpose of these amended documents was to restate the First Amended and Restate Security Agreement of July 21, 2008; to effect a consolidation of the original revolving loans of NE and NI; to eliminate LIBOR pricing options; to make each borrower (NI and NE) a co-borrower of each loan and to add guarantors (*see* ¶ 53 of plaintiff's complaint). Among the various documents executed on March 31, 2009 was an Amended Restated Consolidated Master Note from NI and NE jointly and severally to Provident in the sum of $6,5000.000.00 together with seven other joint and several promissory notes executed by NI and NE to Provident (*see* ¶ 54 of the plaintiff's complaint).

Also executed in connection with the Second Amended Restated Loan and Security Agreement, the joint notes and the loan consolidation documents, was a guaranty of the new aggregate obligations of both NI and NE in the total amount of $14,361,168.00. This new guaranty was executed by Novello and by Cherchio, individually and as Trustee of a Lifetime Trust. It also bears the purported signature of the plaintiff. However, the plaintiff denies that such signature is his asserting, instead, that his name thereon was forged (*see* ¶ 55 of the plaintiff's complaint). Nevertheless, the plaintiff admits to placing his signature as Treasurer of NE on an Incumbency Certificate which certified the accuracy of those listed as the corporate officers of NE, including the plaintiff, and their authority to enter into loan documents with defendant Provident. This Certificate of Incumbency is attached as Exhibit C to the plaintiff's complaint and it bears the date of March 19, 2009. Although the plaintiff alleges in his complaint that the Certificate bears the date of May 19, 2009, his further allegation that he signed said certificate well before the March 31, 2009 closing of the Second Restated Loan is consistent with the actual date on the Certificate of March 9, 2009 (*see* ¶¶ 54; 60 and 61 of the plaintiff's complaint).

By writing dated February 26, 2010, entitled "Promissory Note and/or Modification/and/or Renewal Agreement", defendant, Cherchio as president of NE and NI, as "borrowers" obtained from Provident an extension of the maturity date and a modification of the interest rate of the "Promissory Note and Loan Agreement dated December 28, 2007 in the original principal amount of $4,500,000.00 which had been modified upward to $6,500,000.00 on March 31, 2009 (*see* Exhibit F attached to plaintiff's complaint). This writing also contained an unconditional continuing guaranty of payment of the notes and loans agreements that were the subject of the prefatory Promissory Note and/or Modification/and/or Renewal Agreement. In addition, this guaranty expressly continued the guaranty of the indebtedness evidenced by the extension/modification of the note. The plaintiff admits to signing this guaranty along with the individual defendants listed in the caption.

By his complaint, the plaintiff asserts two causes of action which appear to target the moving defendant, Provident Bank. The first is plaintiff's demand for a judicial declaration "as to whether the Second Amended Guaranty is binding on Salvatore Carucci and whether his obligations have been satisfied" (*see* ¶¶80-84 titled "FIRST Cause of Action" and subparagraph (a) of the Wherefore Clause of the plaintiff's complaint). The second claim is set forth as the NINTH Cause of action wherein the plaintiff seeks recision of that portion of the Second Amended and Restated Guaranty of Payment dated March 31, 2009 which allegedly bears a forged signature of the plaintiff (*see* ¶¶ 126-127 and subparagraph (i) of the Wherefore Clause of the plaintiff's complaint).

Prior to answering, defendant Provident Bank interposed this motion (#001) to dismiss the complaint pursuant to CPLR 3211(a). The sole ground advanced in its moving papers is that the court lacks personal jurisdiction over it. In support of its motion, Provident Bank, through the affidavit of its General Counsel and documentary exhibits, alleges that Provident is a New Jersey-chartered bank that operates under articles of incorporation executed in New Jersey in July of 2002. Provident has its administrative offices in Iselin, New Jersey. Provident is not authorized to do business in New York, it does not have offices in New York, it does own or lease office space in New York nor does it employ workers within the State of New York. The loans at issue in this action were given by Provident to two New Jersey companies in New Jersey. The fact that the plaintiff, a shareholder, officer and guarantor of borrower NE is from New York is allegedly irrelevant since the loan documents, including the first guaranty executed by him on December 28, 2007, the authenticity of which is not in dispute, contains a forum selection clause which placed exclusive jurisdiction in the courts of New Jersey for the "adjudication of any rights or claims arising under this Guarantee or the Note to which this Guarantee relates" (*see* ¶ 6(I) of the guaranty attached as exhibit B to the plaintiff's complaint).

The plaintiff opposes Provident's motion by an affirmation of his counsel with documentary exhibits which are offered to establish facts sufficient to establish prima facie that jurisdiction over Provident exists under CPLR 301 and/or 302(a)(1) or 302(a)(3) or the plaintiff's entitlement to discovery with respect to such jurisdiction. The plaintiff also challenges Provident's reliance on any forum selection clause set forth in any loan documents since the authenticity of his signature on the Second Amended Restated Guaranty is a purported forgery. For the reasons stated below, the motion is granted.

Traditionally, New York courts have exercised personal jurisdiction over non-domiciliary, corporate defendants where such defendants engage in a "continuous and systematic course of doing business" as to warrant a finding of its "presence" in this state (*see* ***Landoil Resources Corp. v Alexander & Alexander Serv.***, 77 NYS2d 28, 563 NYS2d 739 [1990]; ***Tauza v Susquehanna Coal Co.***, 220 NY 259, 115 NE 915 [1917]). The "doing-business" rule, which evolved at common law and is now codified

under the general jurisdictional statute set forth in CPLR 301, imposes a stringent standard since a corporation which is found amenable to suit thereunder may be sued on causes of action wholly unrelated to acts done in New York (*see* ***Landoil Resources Corp. v Alexander & Alexander Serv.***, 77 NYS2d 28, *supra*; ***Ball v Metallurgie Hoboken-Overspelt, S.A.***, 902 F2d 194 [2d Cir. 1990]; *cf.* CPLR 302[a]).

Engagement in occasional or casual business in New York does not suffice under CPLR 301 nor does mere solicitation of New York customers (*see* ***Landoil Resources Corp. v Alexander & Alexander Servs.***, 77 NY2d 28, 34, *supra*; ***Laufer v Ostrow***, 55 NY2d 458, 449 NYS2d 456 [1982]; ***Daniel B. Katz & Assoc. Corp. v Midland,*** 90 AD3d 977, 937 NYS2d 236 [2d Dept 2011]). Instead, a finding of "doing business" under CPLR 301 is dependent upon the existence of traditional indicia, from which, the court may conclude that the foreign defendant has sufficient contacts with New York to warrant a finding that it is present here. Such indicia include whether the corporation has employees, agents, offices or property within the state; whether it is authorized to do business here and the volume of business which it conducts with New York residents (*see* ***Laufer v Ostrow***, 55 NY2d 305, *supra*; ***Frummer v Hilton Hotels Intl., Inc***, 19 NY2d 533, 281 NYS2d 41 [1967]).

While the courts have long espoused that the mere solicitation of business which attracts customers here or results in sales to New Yorkers is insufficient to confer jurisdiction under the traditional doing business rule CPLR 301, they have recognized that substantial solicitation by the foreign corporate defendant, coupled with financial or other commercial dealings in New York, may be sufficient for a finding of doing business here (*see* ***Arroyo v Mountain School***, 68 AD3d 603, 892 NYS2d 74, [1st Dept 2009]; ***Landoil Resources Corp. v Alexander & Alexander Serv., Inc.,*** 918 F2d1039 [2d Cir. 1990]). This second prong of the doing business test is known as the "solicitation-plus" rule. Under this rule, engagement in solicitation that is substantial and continuous, coupled with other activities of substance in the New York, may warrant a finding of a general jurisdiction under CPLR 301 (*see* ***Arroyo v Mountain School***, 68 AD3d 603, *supra*; ***Sedig v Okemo Mountain,*** 204 AD2d 709, 612 NYS2d 643 [2d Dept 1994]; ***Weil v American Univ.***, 2008 WL 126604, 2008 U.S. Dist. LEXIS 1727 [SD NY 2008]; ***Landoil Resources Corp. v Alexander & Alexander Servs.***, 918 F2d 1039, *supra*; ***Brown v Ghost Town in the Sky***, 2001 WL 1078341 [ED NY 2001]).

Since the ultimate burden of proof rests with the party asserting jurisdiction, such party must show, prima facie, that the defendant is subject to the personal jurisdiction of the court in order to defeat a motion to dismiss based upon a lack of long-arm jurisdiction (*see* ***College v Brady***, 84 AD3d 1322, 924 NYS2d 529 [2d Dept 2001]; ***Lang v Wycoff Hgts. Med. Ctr.***, 55 AD3d 793, 866 NYS2d 313 [2d Dept 2008]; ***Cornely v Dynamic HVAC Supply, LLC***, 44 AD3d 986, 986, 845 NYS2d 797 [2d Dept 2007]). However, the plaintiff may delay determination of a motion to dismiss pursuant to CPLR 3211(a)(8) on the ground that discovery on the issue of personal jurisdiction is necessary. In such a case, the plaintiff need not make a prima facie showing of jurisdiction, but instead "need only demonstrate that facts 'may exist' to exercise personal jurisdiction over the defendant" (***Ying Jun Chen v Lei Shi***, 19 AD3d 407, 796 NYS2d 126 [2d Dept 2005]; quoting ***Peterson v Spartan Indus.***, 33 NY2d 463, 467, 354 NYS2d 905 [1974]). If "it appear[s] from affidavits submitted in opposition to [the] motion ... that facts essential to justify opposition may exist but cannot then be stated," a court may, in the exercise of its discretion, postpone resolution of the issue of personal jurisdiction pending discovery (CPLR 3211[d]; *see* ***Ying Jun Chen v Lei Shi***, 19 AD3d at 407–408, *supra*).

Here, Provident sufficiently established that it is not subject to the jurisdiction of this court because it does not do business here in New York within the contemplation of CPLR 301. The absence

of an office, employees, authorization to do business here and the absence of any real property interests in New York reflects that Provident has insufficient traditional indicia of a presence in New York.

The plaintiff's opposing papers failed to establish facts necessary to support a finding that Provident may be deemed to have a presence under the "doing business" rule of CPLR 301 or to defer determination of this motion until discovery on the issue of Provident's business activities is conducted. Although the plaintiff adduced proof that Provident issued a single loan to a New York corporation with which the plaintiff is affiliated, such proof provides an insufficient basis on which jurisdiction may attach. There is no evidence of the existence of any "continuous and systematic course of doing business" nor of any "solicitation-plus" contacts here in New York which would warrant a finding of Provident's "presence" in this state. Other than innuendo and speculative assertions that Provident is doing business here by providing loans to New York customers because it loaned monies to the plaintiff's affiliate corporation, Island Wide Site Development Corporation, the plaintiff failed to establish that facts "may exist" to exercise personal jurisdiction over Provident and that they constitute a "sufficient start" to warrant further discovery on the issue as contemplated by CPLR 3211(d) (*cf.*, ***Ying Jun Chen v Lei Shi***, 19 AD3d 407, 408 *supra*).

Nor is there any basis in the record for a finding that jurisdiction may exist under New York's specialized long arm statute codified at CPLR 302. This long arm statute is a "single act statute [and] ... 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" (***Kimco Exch. Place Corp. v Thomas Benz, Inc.***, 34 AD3d 433, 434, 824 NYS2d 353 [2d Dept 2006]). Under CPLR 302(a)(1), a court may exercise jurisdiction over any non-domiciliary who "transacts any business within the state or contracts anywhere to supply goods or services in the state". "Essential to the maintenance of a suit against a non-domiciliary under CPLR 302 (subd [a], par 1) is the existence of some articulable nexus between the business transacted and the cause of action sued upon" (***Peter Lisec Glastechnische Industrie GmbH v Lenhardt Maschinenbau GmbH*** 173 AD2d 70, 577 NYS2d 803 [1st Dept 1991], quoting ***McGowan v Smith***, 52 NY2d 268, 272, 437 NYS2d 643 [1981]; *see also* ***Arroyo v Mountain School***, 68 AD3d 603, 604, *supra*). Since the single loan transaction by Provident to Island Wide relied upon by the plaintiff cannot be said to have arisen directly out of the transactions at issue in this action, there is no jurisdiction over Provident under CPLR 302(a)(1).

Nor has the plaintiff demonstrated the potential that jurisdiction might attach to Provident under the provisions of CPLR 302(a)(3). It is therein provided that personal jurisdiction over a non-domiciliary may be exercised when the defendant "commits a tortious act without the state causing injury to person or property within the state." Although the tort of forgery is alleged herein by the plaintiff, there are no allegations that Provident was the forger or may be held liable therefor as an aider or abettor thereof. Moreover, it is well established that the residency of plaintiff injured economically by a commercial tort does not give rise to long-arm jurisdiction over a non-domiciliary defendant under CPLR 302(a)(3) (*see* ***McGowan v Smith***, 52 NY2d 268, *supra*). The opposing papers submitted in opposition to this motion failed to demonstrate that facts essential to justify opposition may exist so as to warrant the postponement of the resolution of the issue of personal jurisdiction pursuant to CPLR 302 pending discovery (*see* CPLR 3211[d]).

The court has considered the remaining contentions of the parties and finds them to be without merit. The court construes Provident's reliance upon the forum selection clause set forth in the original

guaranty not as an independent ground for dismissal but merely as a factor offered in support of its claim that the court lacks personal jurisdiction over it (*see* ***Brax Capital Group, LLC v WinWin Gaming, Inc.***, 83 AD3d 591, 922 NYS2d 43 [1st Dept 2011]; ***Peter Lisec Glastechnische Industrie GmbH v Lenhardt Maschinenbau GmbH*** 173 AD2d 70, *supra*).

In view of the foregoing, the instant motion by defendant Provident for dismissal of those portions of the plaintiff's complaint wherein he asserts claims against Provident are granted pursuant to CPLR 32121(a)(8). The First and Ninth causes of action set forth in the plaintiff's complaint are thus dismissed as to moving defendant Provident Bank.

DATED: 5/1/12

THOMAS F. WHELAN, J.S.C.