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

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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GERALD PINSKY, BOTNICK TRUST, CORTLAND REALTY INVESTMENTS, LLC,

Plaintiffs,

-against-

TORAH ENCOUNTERS INC., YOSEF GUTMAN, YERUCHAM GOLDWASSER, TOVA GOLDWASSER,

Defendants.

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TRIAL/IAS PART: 16
NASSAU COUNTY

Index No: 601066-11
Motion Seq. No: 1
Submission Date: 5/24/12

The following papers having been read on this motion:

Notice of Motion, Affirmation in Support, Affidavits in Support and Exhibits....x
Memorandum of Law in Support.....x
Affirmation in Opposition and Exhibits.....x
Affidavit of G. Barkany and Exhibit.....x
Memorandum of Law in Opposition.....x

This matter is before the Court for decision on the motion by Defendants Yosef Gutman ("Yosef"), Yerucham Goldwasser ("Yerucham") and Tova Goldwasser ("Tova") filed on February 16, 2012 and submitted on May 24, 2012.[1] Counsel for the parties provided the Court with a copy of a Partial Stipulation of Voluntary Discontinuance dated April 18, 2012, reflecting

[1] As noted by the Clerk when this motion was filed, the caption on Defendants' notice of motion is not identical to the caption on the complaint (Ex. A to Schwartz Aff. in Supp.).

the discontinuance of this action as to Defendant Tova Goldwasser. With respect to Defendants Yosef and Yerucham, for the reasons set forth below, the Court concludes that it appears from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist and may be uncovered during discovery. Accordingly, the Court denies the motion, without prejudice to Defendants moving to dismiss on the basis of lack of personal jurisdiction following the completion of discovery.

BACKGROUND

A. Relief Sought

Defendants Yosef and Yerucham ("Defendants") move for an Order, pursuant to CPLR § 3211(a)(8), dismissing the Complaint against the Defendants on the grounds of lack of personal jurisdiction.

Plaintiffs oppose Defendants' motion.

B. The Parties' History

The Complaint alleges that this case arises from a Ponzi scheme perpetrated by Gershon Barkany ("Barkany") who fraudulently represented to investors that he was a successful financial advisor and real estate. Plaintiffs allege that Barkany's income, in fact, was generated from the sale of investments in fraudulent real estate and investments transactions that were integral to the alleged scheme ("Scheme"). The Complaint alleges, further, that Defendants were beneficiaries of the Scheme in that, between 2008 and 2010, they received transfers ("Transfers") in the form of "charitable donations" from Barkany and the entities he controlled (Compl. at ¶ 3) in excess of $1.7 million. These "donations" allegedly helped create the impression that Barkany was an honest and charitable businessman. Plaintiffs seek the return of the proceeds that Defendants received, directly or indirectly, from the Transfers.

The Complaint alleges that Defendant Torah Encounters Inc. ("TEI"), which maintains offices in Connecticut, holds itself out to the public as a nonprofit charitable organization. The Complaint alleges, further, that TEI regularly transacts business in the State of New York ("New York") by offering weekly dinners and classes at a facility located in New York City.

The Complaint alleges that Yosef is an individual residing in Connecticut who was, at all relevant times, the Executive Director of TEI, and regularly transacted business in New York in that capacity. The Complaint alleges that Yerucham is an individual residing in Israel who holds

dual United States and Israel citizenship. The Complaint alleges that Yerucham was, at all relevant times, the Founder, Director and Dean of TEI, and regularly transacted business in New York in that capacity.

The Complaint contains five (5) causes of action: 1) the Transfers violated New York Debtor and Creditor Law ("DCL") § 273; 2) the Transfers violated DCL §275; 3) the Transfers violated DCL § 276; 4) the Transfers violated DCL § 276(a); and 4) Defendants were unjustly enriched. Plaintiffs seek monetary damages, as well as injunctive relief and a pre-judgment order of attachment restraining and enjoining Defendants from disposing of their assets, and attaching Defendants' assets.

In support of Defendants' motion, Yosef affirms that 1) he resides in Connecticut; 2) he does not live, work or conduct business in New York; 3) he did not physically enter New York to engage in any business transactions with any of the Plaintiffs in any capacity; and 4) he did not physically enter New York to engage in any of the transactions complained of in the Complaint. Yerucham affirms that 1) he resides in Israel; 2) he does not live, work or conduct business in New York; 3) he did not physically enter New York to engage in any business transactions with any of the Plaintiffs in any capacity; and 4) he did not physically enter New York to engage in any of the transactions complained of in the Complaint. Defendants submit that Plaintiffs have not alleged that Defendants personally engaged in any systematic course of doing business in New York, but rather are improperly attempting to establish jurisdiction over them personally by alleging that TEI engaged in a systematic course of doing business in New York.

In opposition, Barkany affirms that he is a resident of New York and a principal of numerous entities set forth at paragraph 3 of his Affidavit ("Affiliated Entities"), all of which were incorporated in New York. The Plaintiffs make reference to the Affiliated Entities in the Complaint, alleging that some of the transactions at issue involved loans by Plaintiffs directly to Barkany or the Affiliated Entities (Compl. at ¶ 27).

Barkany affirms that he has known Yerucham for over seven (7) years, during which time he has met with him numerous times during his "many" visits to New York (Barkany Aff. at ¶ 5). In addition to meeting with Yerucham during his visits to New York, Barkany and Yerucham have communicated by email and telephone, and Barkany provides a copy of emails

dated November 12, 19 and 26 of 2010 (*id.* at Ex. A). Those emails, sent by "Rabbi Goldwasser," contain references that appear religious and/or philosophical, and do not make any obvious reference to the transactions at issue. The emails do, however, reflect that they are from Yerucham at TEI, and contain a New York address for that entity.

Barkany affirms that, as a result of his meetings and correspondence with Yerucham, he and his Affiliated Entities transferred in excess of $1.7 million to TEI, which funds were drawn on accounts at New York financial institutions. In addition, Barkany gave money directly to Yerucham which was intended for his own personal use, which funds were also drawn on accounts at New York financial institutions.

Barkany affirms that he has known Yosef since 2008 and has met with him in New York "on a number of occasions" (Barkany Aff. at ¶ 10). During two of those meetings, Barkany and Yosef discussed Barkany hiring Yosef "to manage the contributions that I was making to other charitable and religious organizations" (*id.* at ¶ 11). Yosef agreed to work for Barkany in this capacity, and Barkany agreed to compensate him. Although Yosef began working for Barkany, his employment ceased when Barshany no longer had a need for his services, and Barshany never paid Yosef for the work he performed.

Plaintiffs' counsel provides documentation in support of Plaintiffs' assertion that Yerucham regularly transacts business in New York, including 1) a document dated April 20, 2012 regarding Yerucham providing classes on a monthly basis at TEI's Park Side Torah Center in New York City, 2) photographs of Yerucham at an annual TEI fundraising dinner in New York, 3) a check dated June 14, 2010 payable to TEI from Barkany and another individual who are New York residents, in the amount of $36,000, drawn on a New York financial institution, and 4) two transfers, each in the amount of $7,000, from Barkany and another individual to Tova and Yerucham, which contain the names "Tova Goldwasser" and "Jeremy Goldwasser" in the memo portions. With respect to Defendant Yosef, Plaintiffs' counsel notes that the TEI literature lists Yosef as a member of its staff, and provides photographs of Yosef at the 2011 TEI annual dinner in New York.

C. The Parties' Positions

Defendants submit that the Court should dismiss the Complaint against Defendants Yosef and Yerucham on the grounds that Plaintiffs 1) have failed to identify a purposeful activity or

transaction by Yerucham in New York out of which the cause of action arose; and 2) have failed to establish a substantial relationship or nexus between the business transacted by Defendants in New York and Plaintiff's cause of action.

Plaintiffs oppose Defendants' motion, submitting that "the purposeful nature of [Yerucham] and [Yosef's] activity in New York and the quality of their contacts with the state establish that they transacted business in New York and are subject to personal jurisdiction in this Court" (Ps' Memo. of Law in Opp. at p. 8). Plaintiffs submit that those contacts are demonstrated, *inter alia*, by 1) Barkany's affirmations regarding his meetings with the Defendants in New York, and 2) the documentary evidence reflecting Defendants' presence in New York to give lectures, teach classes and engage in fundraising for TEI, an organization that operated a facility in New York.

RULING OF THE COURT

CPLR § 302 provides, in pertinent part:

> 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...who in person or through an agent: 1) transacts any business within the state...; or 2) commits a tortious act within the state...; or 3) commits a tortious act without the state causing injury to a person or property within the state...if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

Personal jurisdiction over a defendant that engages in purposeful activity is proper because the defendant has invoked the benefits and protections of our laws. *Ehrenfeld v. Bin Mahfouz*, 9 N.Y.3d 501, 508 (2007). Thus, a defendant may transact business in New York and be subject to personal 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. *Fischbarg v. Doucet*, 9 N.Y.3d 375, 380 (2007). Purposeful activities are those in which a defendant, through volitional acts, avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws. *Daniel B. Katz & Associates Corp. v. Midland Rushmore, LLC*, 90 A.D.3d 977, 979 (2d Dept. 2011), citing *Fischbard, supra*, at 380, quoting *McKee Elec. Co. v. Rauland-Borg Corp.*,

20 N.Y.2d 377, 382 (1967).

While the ultimate burden of proof rests with the party asserting jurisdiction, the plaintiff, in opposition to a motion to dismiss pursuant to CPLR § 3211(a)(8), need only make a *prima facie* showing that the defendants were subject to the personal jurisdiction of the Supreme Court. *Daniel B. Katz & Associates Corp.*, 90 A.D.3d at 978, quoting *Cornely v. Dynamic HVAC Supply, LLC*, 44 A.D.3d 986 (2d Dept. 2007). When opposing a motion to dismiss a complaint pursuant to CPLR § 3211(a)(8) on the ground that discovery on the issue of personal jurisdiction is necessary, plaintiffs 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. *Id.*, citing *Ying Jun Chen v. Lei Shi*, 19 A.D.3d 407, 407-408 (2d Dept. 2005), quoting CPLR § 3211(d). If it appears from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may, in the exercise of its discretion, postpone resolution of the issue of personal jurisdiction. *Id.*, quoting CPLR § 3211(d). CPLR 3211(d), titled "Facts unavailable to opposing party," provides as follows:

> Should it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just.

Plaintiffs have alleged that Defendants, through meetings with Barkany and their involvement with TEI in New York, have engaged in purposeful activities in New York, and that there is a substantial relationship between those activities and the claims asserted by Plaintiffs. Although the emails provided by Barkany do not appear to relate specifically to the Transfers, they corroborate that Barkany and Yerucham communicated with each other, and that Yerucham represented TEI, an entity located in New York. The other documentation provided by Plaintiffs also provides evidence of a relationship between Defendants and TEI, and Defendants' involvement in TEI's activities in New York. Under these circumstances, the Court concludes that Plaintiffs have demonstrated that facts may exist to exercise personal jurisdiction over the Defendants, and further discovery may provide additional proof of Defendants' engagement in purposeful activities in New York, and a substantial relationship between those activities and the

allegations in the Complaint. Accordingly, pursuant to CPLR § 3211(d), the Court denies the motion, without prejudice to Defendants moving to dismiss on the basis of lack of personal jurisdiction following the completion of discovery.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Compliance Conference on August 9, 2012 at 9:30 a.m.

ENTER

DATED: Mineola, NY
July 9, 2012

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