SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice PART 45

Index Number : 651532/2011
ARAMID ENTERTAINMENT FUND, LTD
vs.
WIMBLEDON FINANCING MASTER
SEQUENCE NUMBER : 002
DISMISS ACTION

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

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion ~~is~~ by defendant David Bergstein to dismiss this action as to him is GRANTED per the attached Decision and Order.

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

Dated: February 24, 2012

J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

ARAMID ENTERTAINMENT FUND LTD., ARAMID CAPITAL PARTNERS LLP, SCREEN CAPITAL INTERNATIONAL CORP.,	Index No. 651532/11
Plaintiffs,	DECISION AND ORDER
-against-	Motion Sequence No. 002
WIMBLEDON FINANCING MASTER FUND, LTD., WFM HOLDINGS LTD., STILLWATER CAPITAL PARTNERS, INC., STILLWATER NEUTRAL FUND III SPC, GEROVA FINANCIAL GROUP, LTD., FORTIS BANK CAYMAN, LTD., JOSEPH BIANCO, DAVID BERGSTEIN, CHARLES, FREDERIC & CO., and JOHN DOES 1-10,	
Defendants.	

MELVIN L. SCHWEITZER, J.:

In Motion Sequence 002, defendant David Bergstein (Bergstein), a movie investor who lives in California, moves the court to dismiss the amended complaint[1] as against him pursuant to CPLR 3211 (a) (5) (expiration of the applicable statute of limitations), CPLR 3211 (a) (7) (failure to state a cause of action), and CPLR 3211 (a) (8) (lack of personal jurisdiction), and for an award of attorneys' fees incurred in defending this action pursuant to 22 NYCRR NYCRR 130-1.1. The amended complaint seeks recovery under three causes of action: (1) tortious interference with prospective economic advantage; (2) prima facie tort; and (3) willful misconduct.

[1] The initial complaint was filed on July 25, 2011. Bergstein's motion to dismiss the initial complaint was filed on September 16, 2011. The amended complaint was filed on October 24, 2011. The present motion is therefore directed at the amended complaint.

For the reasons stated below, the motion to dismiss the amended complaint against Bergstein is granted based on the ground of lack of personal jurisdiction.

Background

A. The Parties

Plaintiffs filed this action against two sets of defendants allegedly working in unison: Bergstein, and all of the other named defendants.[2] Plaintiff Aramid Entertainment Fund Ltd. (Aramid) is a Cayman Islands exempted open-ended investment company. It provides short- and medium-term loans to producers and distributors of film, television and other media. Nonparty David Molner (Molner) is the CEO of Aramid. Aramid employs plaintiff Aramid Capital Partners LLP (TSP), in part, to source and refer investment opportunities to it. TSP, which was formed in 2006, is a limited liability partnership organized under the laws of England and Wales, with its principal place of business in the United Kingdom.

Plaintiff Screen Capital International Corp. (SCI) was founded approximately 10 years ago by Molner to find, structure and execute a variety of financings for investors interested in entertainment assets. It is incorporated in the State of Delaware, with its principal place of business in Los Angeles, California.

Defendant Wimbledon Financing Master Fund, Ltd. (Wimbledon) is a company organized under the laws of the Cayman Islands, and purports to be a beneficial owner of non-voting shares of Aramid stock. Defendant WFM Holdings Ltd. (WFM) is a

[2]Defendants Wimbledon Financing, Master Fund, Ltd., WFM Holdings Ltd., Stillwater Capital Partners, Inc., Stillwater Neutral Fund III SPC, Gerova Financial Group, Ltd., Fortis Bank Cayman, Ltd., Joseph Bianco, Charles, Frederic & Co., and John Does 1-10 were previously dismissed from this action pursuant to this court's Decision and Order dated February 8, 2012.

company organized under the laws of the Cayman Islands, and also purports to be a beneficial owner of non-voting shares of Aramid stock. Defendant Stillwater Market Neutral Fund III SPC (Stillwater MNF) also was organized under the laws of the Cayman Islands, and is another purported beneficial owner of non-voting shares of Aramid stock. Stillwater Capital Partners, Inc. (Stillwater) is a New York corporation and registered investment advisor to Stillwater MNF. The two Stillwater companies have offices located at 41 Madison Avenue, in New York City.

Defendant Gerova Financial Group, Ltd. (Gerova) is a Bermuda company whose recently resigned chairman and former CEO, defendant Joseph Bianco (Bianco), maintains offices in New York City. These offices are on the same floor and building as the Stillwater Capital Fund. Bianco also exercised control over Wimbledon and Stillwater MNF. He lives in New York. All defendants, except Bergstein, will be known as the Gerova defendants.

Bergstein lives in Los Angeles, California. He is a self-described "distressed asset" specialist who allegedly has defaulted on over $100 million worth of loans and personal guarantees to Aramid and other lenders. He is alleged to have continuing financial and commercial ties to defendants Gerova Financial Group, Ltd. (Gerova), Bianco and the other defendants.

Defendant Fortis Bank Cayman Ltd. (Fortis) is another company organized under the laws of the Cayman Islands, and it is the registered custodian for WFM of its non-voting shares in Aramid. Defendant Charles, Frederic & Co. (Charles Frederic) was organized under the laws of the Cayman Islands, and it is the registered custodian for Stillwater MNF's non-voting shares of Aramid stock. The defendants John Does 1-10 either allegedly participated or aided and abetted the tortious conduct described in the complaint.

B. The Factual Allegations

In late 2009, Wimbledon, WFM and Stillwater MNF, which collectively held approximately 10% of Aramid stock, were suffering from major cash shortfalls and were struggling to pay shareholder redemptions. To alleviate these difficulties, Stillwater MNF, Stillwater Capital, Wimbledon and WFM merged into a single entity, Gerova. The merger was consummated sometime in January 2010.

In March 2010, Gerova approached Aramid and TSP with a merger proposal. Gerova's offer was presented to the Aramid shareholders meeting, who rejected the offer, and authorized Molner to pursue a sale of assets with nonparty ABRY Partners (ABRY), a Boston-based company.

During this same time, a group of creditors led by Aramid and the major Hollywood talent guilds, including the Screen Writers Guild and the Directors Guild, filed involuntary Chapter 11 (reorganization) petitions with the United States Bankruptcy Court for the Central District of California to take over and liquidate non-parties R2D2, LLC, Capitol Films Development, LLC, ThinkFilm and two other companies formerly controlled by Bergstein (CTI Holdings, LLC and Capco, LLC). Bergstein and the five debtor companies opposed the involuntary petitions, and the motions for the appointment of a trustee. On March 30, 2010, an interim trustee was appointed. Plaintiffs aver a connection between the two events described above. They insist that the bankruptcy filing led Bergstein to exact revenge on Aramid, Molner, TSP and SCI, and that he enlisted the Gerova defendants, who were upset that the merger with Aramid failed to go through, to wreck havoc on Aramid.

In June 2010, Bergstein and the debtor companies allegedly launched the main assault against Aramid and SCI when they filed a motion in the Los Angeles Bankruptcy Court for an order requiring Aramid and SCI to post a $50 million bond. Bergstein allegedly claimed that: (1) Aramid and SCI were in serious financial difficulties, and that (2) Aramid and SCI filed the involuntary petitions in bad faith.

Subsequently, on July 2, 2010, Bergstein informed TheWrap.com, a film-industry blog, that the involuntary Chapter 11 petitions against his companies were a bad-faith filing. He further stated that "Aramid is broke ... [and] Molnner bled off tens of millions of dollars and the majority of his $300 million was lost." The article stated that "Bergstein alleges that Aramid is an off-shore company, operating out of the Cayman Islands and is attempting to disguise the fact that they are in severe financial distress."

Meanwhile, ABRY submitted a conditional offer to purchase most of Aramid's assets on June 14, 2010. The offer was valued at approximately $130 million. As part of the structured transaction, TSP would "travel" with the assets sold and continue to provide technical services to ABRY. ABRY's offer was initially submitted to the Aramid shareholders on June 17, 2010. A revised cash-only offer was submitted on July 6, 2010. The offer was conditioned on the approval of the Aramid board and certain due diligence.

On August 15, 2010, Bianco contacted Aramid shareholders via e-mail and through on-line discussion groups, and allegedly misled them into believing that their assets were overvalued and that they were being defrauded by plaintiffs. Subsequently, on September 5, 2010, Bianco met with Molner in Binghamton, New York and offered to quiet Aramid's shareholder

discontent, but only if Molner stepped down from TSP and SCI. Molner rejected Bianco's demand.

On September 29, 2010, Bianco submitted a declaration in support of the Bergstein Debtors' bond motion. In his declaration, he claimed that the bankruptcy proceeding was filed to hide plaintiffs' own grave financial troubles, and that Aramid's assets were "grossly overstated on [its] books and records." On October 14, 2010, the Bankruptcy Court denied Bergstein's bond motion.

TSP is the sole holder of the voting shares of Aramid. After Bianco's e-mails to the Aramid shareholders, TSP concluded that it was unable to approve the sale of Aramid assets to ABRY. According to plaintiffs, defendants created enough shareholder discord that the proposed deal with AMBRY fell through, causing them lost profits and reputational harm.

Discussion

Although Bergstein presents several grounds for dismissal of the complaint, the decisive issue is whether the court can assert personal jurisdiction over Bergstein. Plaintiffs argue that the court has both general and specific jurisdiction under New York's long-arm statutes. In the alternative, plaintiffs seek jurisdictional discovery pursuant to CPLR 3211 (d).

In considering a motion to dismiss, the pleadings and affidavits are to be construed in the light most favorable to plaintiff, the non-moving party, and all doubts are to be resolved in plaintiff's favor (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Cron v Hargro Fabrics*, 91 NY2d 362, 366 (1998); *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Plaintiffs, as the parties seeking to assert personal jurisdiction, bear the burden of proof on this

issue (*see Stewart v Volkswagen of Am.*, 81 NY2d 203, 207 [1993]; *Marist Coll. v Brady*, 84 AD3d 1322, 1322-1323 [2d Dept 2011]).

In order for the court to properly exercise jurisdiction over a non-resident defendant, two questions must be answered affirmatively: (1) is the assertion of jurisdiction authorized by statute (CPLR 301 and CPLR 302), and (2) if authorized, is the exercise of state law consistent with basic due process requirements mandated by the Fourteenth Amendment of the United States Constitution (*LaMarca v Pak–Mor Mfg. Co.*, 95 NY2d 210, 216-219 [2000])? Courts generally distinguish between general and specific jurisdiction.

General jurisdiction, pursuant to CPLR 301, is the finding of jurisdiction over a non-resident defendant based on his general presence in the State, and not specifically based on his actions within the State. Courts may exercise general jurisdiction when plaintiffs show that defendants are engaged in such a "continuous and systematic" course of "doing business" in New York that a finding of its "presence" in this jurisdiction is justified (*see e.g. Landoil Resources Corp. v Alexander & Alexander Servs.*, 77 NY2d 28, 33 [1990]). "The essential factual inquiry is whether the defendant has a permanent and continuous presence in the State, as opposed to merely occasional or casual contact with the State" (*Holness v Maritime Overseas Corp.*, 251 AD2d 220, 222 [1st Dept 1998]; *see also Laufer v Ostrow*, 55 NY2d 305, 309-310 [1982]). Factors include whether office space, bank accounts, directors' meetings and financial transactions are in New York or have taken place in New York (*see Bryant v Finnish Natl. Airline*, 15 NY2d 426, 432 [1965]).

In this case, defendant has established that he does not reside in New York, nor does he have offices or employees within the State. As well, Bergstein is not involved in direct sales of

goods or services on a continuous basis in New York. Because no showing has been made that Bergstein engaged in the kind of activity in New York that approximates "doing business" within the State's borders, CPLR 301 is inapplicable.

New York's long-arm statute is codified in CPLR 302. It provides, in part:

> "[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; or
> 2. commits a tortious act within the state ...; or
> 3. commits a tortious act without the state causing injury to person or property within the state ..., if he ...
> (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce ... ."

CPLR 302 (a).

The only section of the long-arm statute applicable to plaintiffs' complaint is CPLR 302 (a) (2). Arguing that there is no question that Bergstein and Bianco entered into a conspiracy to damage the proposed transaction with ABRY by committing the torts alleged in the amended complaint, plaintiffs allege that Bergstein is subject to personal jurisdiction under a "conspiracy" theory. Specifically, plaintiffs allege that Bianco, a New York resident, is both (1) an agent of Bergstein, and (2) a co-conspirator involved in all aspects of the plot to hurt them.

To demonstrate that a defendant acted through an agent, plaintiffs must "convince the court that [Bianco and the Gerova defendants, the alleged New York actors] engaged in purposeful activities in this State in relation to his transaction for the benefit of and with the knowledge and consent of [the defendant] and that [Bergstein] exercised some control over [the New York actors]" in the matter (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]

[Court found personal jurisdiction over a Texas resident who acted solely in Texas, but whose actions were part of an overall scheme to defraud a New York resident]; *see also Kimco Exch. Place Corp. v Thomas Benz, Inc.*, 34 AD3d 433, 434 [2d Dept 2006] [denying personal jurisdiction over defendant whose contact with New York was limited to phone calls and a fax]).

The agency relationship required to extend jurisdiction over a non-domiciliary based on the acts of his agent is not limited to traditional agency relationships (*see e.g. Kreutter v McFadden Oil Corp.*, 71 NY2d at 467 ["Plaintiff need not establish a formal agency relationship between (the defendant) and (the actors in New York")]).

While there is no substantive tort of conspiracy in New York (*see MBF Clearing Corp. v Shine*, 212 AD2d 478, 478 [1st Dept 1995]; *Routsis v Swanson*, 26 AD2d 67, 71 [1st Dept 1966]), the tortious acts of a New York co-conspirator can serve to extend jurisdiction over a non-resident co-conspirator. For instance, in *Reeves v Phillips* (54 AD2d 854, 855 [1st Dept 1976]), personal jurisdiction was found over a Texas resident who conspired with New York board members of a Texas corporation to delay a takeover bid. The Appellate Division, First Department, held that the acts of a co-conspirator may be attributed to a defendant for purposes of obtaining personal jurisdiction (*see also CIBC Mellon Trust Co. v Mora Hotel Corp.*, 296 AD2d 81, 98-100 [1st Dept 2002], *affd* 100 NY2d 215 [2003]).

To satisfy the pleading requirements of a conspiracy, a plaintiff must allege facts which support "(1) a corrupt agreement between two or more parties; (2) an overt act in furtherance of the agreement, which constitutes an independent tort or wrongful act; (3) the defendant's intentional participation in the furtherance of the plan or purpose; and (4) resulting damages or

injury" (*Williams v Sidley Austin Brown & Wood, L.L.P.*, 13 Misc 3d 1213[A], 2006 NY Slip Op 51810[U], *3 [Sup Ct, NY County 2006], *affd* 38 AD3d 219 [1st Dept 2007]). However, bland or conclusory assertions of a conspiracy are insufficient to establish jurisdiction for purposes of section 302 (a) (2)(*see Lamarr v Klein*, 35 AD2d 248, 250 [1st Dept 1970], *affd* 30 NY2d 757 [1972]; *Glenn v SBPartners LLC*, 18 Misc 3d 1123[A], 2008 NY Slip Op 50163[U] [Sup Ct, Nassau County 2008]).

Here, plaintiffs are unable to satisfy the requirements of a conspiracy. The allegations fall short of demonstrating either a "corrupt agreement" or some act which constitutes an intentional tort or wrongful act. Although CPLR 302 (a) (2) is a "single act" statute (*see George Reiner & Co. v Schwartz*, 41 NY2d 648, 651 [1977]), there must be a substantial relationship between the transaction and the claim asserted (*Kreutter v McFadden Oil Corp.*, 71 NY2d at 467), which does not appear here. The e-mails sent by Bianco are insufficient for this purpose (*see Edelman v Taittinger, S.A.*, 298 AD2d 301, 302 [1st Dept 2002]).

Plaintiffs have similarly failed to come forward with any ground for jurisdiction based upon the article posted on an Internet website. Notably there are no factual allegations in the complaint that the Internet posting on TheWrap.com website was expressly directed at plaintiffs, or to the State of New York. The article posted on the website does not refer to the New York activities of plaintiffs or even to New York. Nor have plaintiffs even made a sufficient start to warrant jurisdictional discovery (*see Lettieri v Cushing*, 80 AD3d 574, 575 [2d Dept 2011]).

More importantly, the exercise of personal jurisdiction over Bergstein is not constitutionally reasonable. The due process analysis requires the court to consider whether Bergstein, as a non-resident party, had sufficient "minimum contacts" with New York so that

jurisdiction over him "does not offend 'traditional notions of fair play and substantial justice'" (*International Shoe Co. v State of Washington*, 326 US 310, 316 [1945], quoting *Milliken v Meyer*, 311 US 457, 463 [1940]; *see also World-Wide Volkswagen Corp. v Woodson*, 444 US 286 [1980]; *Indosuez Intl. Fin. v National Reserve Bank*, 98 NY2d 238 [2002]). The non-resident party's conduct and connection with the forum state must be such that the party "'should reasonably anticipate being haled into court there'" (*LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d at 216, quoting *World-Wide Volkswagen Corp. v Woodson*, 444 US at 297). Given Bergstein's de minimis contacts with New York, it would be unfair to require Bergstein to defend himself in New York.

Lastly, defendant's motion for sanctions, including attorneys' fees, pursuant to 22 NYCRR 130-1.1, is denied. However, costs and disbursements are awarded to Bergstein.

Conclusion

Under these circumstances, that portion of Bergstein's motion to dismiss the complaint as against him for lack of personal jurisdiction is granted.

Accordingly, it is hereby

ORDERED that defendant David Bergstein's motion to dismiss the complaint as against him is granted; and it is further

ORDERED that the complaint is dismissed as against said defendant, with costs and disbursements to him as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant.

Dated: February 24, 2012

ENTER:

Melvin L. Schweitzer, J.S.C.

MELVIN L. SCHWEITZER
J.S.C.