

Apex Media Sales, LLC v MyFamily TV, LLC
2012 NY Slip Op 33328(U)
January 4, 2012
Supreme Court, New York County
Docket Number: 652296/11
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

P
Index Number : 652296/2011
APEX MEDIA SALES, LLC
vs
MYFAMILY TV, LLC
Sequence Number : 001
DISMISS ACTION

PART 45

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 Lukon
Communications, LLC to dismiss the complaint
as to it is GRANTED;
The complaint against the remaining
Defendants is severed and shall
continue against them;
Plaintiff's cross-motion is DENIED,
all as per the attached Decision
and Order dated January 4, 2012.

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

Dated: January 4, 2012

[Handwritten signature]

- 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

-----X		
APEX MEDIA SALES, LLC, a Delaware	:	
limited liability company,	:	
	:	
Plaintiff,	:	Index No. 652296/11
	:	
-against-	:	DECISION AND ORDER
	:	
MYFAMILY TV, LLC, a Florida limited liability	:	Sequence No. 001
company, VALCOM, INC., a Delaware corporation,	:	
and LUKEN COMMUNICATIONS, LLC, a	:	
Tennessee limited liability company,	:	
	:	
Defendants.	:	
-----X		

MELVIN L. SCHWEITZER, J.:

Apex Media Sales, LLC (Apex) sues MyFamily, LLC, a Florida limited liability company (MyFamily-Florida), Valcom, Inc., a Delaware corporation (Valcom) and Luken Communications, LLC, a Tennessee limited liability company (Luken). The complaint alleges MyFamily-Florida breached an Advertising Sales Representation Agreement, dated October 28, 2009 (the Agreement), which made Apex the exclusive representative for the sale of advertising inventory available on the MyFamily TV Network through June 25, 2013. The complaint alleges MyFamily-Florida breached the Agreement by refusing to use Apex as exclusive representative while instead is using Luken as its “in house” sales representative. See Complaint, Ex. A to Affidavit of Henry S. Luken III, sworn to on October 7, 2011 (Moving Affidavit), ¶¶ 1-5. Apex also sues Luken for tortious interference with the Agreement. *Id.*, ¶ 8, 35-42.

The complaint alleges that defendant Valcom is the alter ego of MyFamily-Florida (*id.*, ¶ 4), and that on March 11, 2011 Valcom issued a press release stating that it had entered into a joint venture with Luken relating to “the distribution of My Family TV broadcast network

subsidiary.” *Id.*, ¶ 21. Luken moves pursuant to CPLR 3211 (a) (2) to dismiss the complaint against it for lack of personal jurisdiction and Apex cross-moves pursuant to CPLR 3211 (d) for a continuance to permit discovery to be obtained to show the court has jurisdiction over Luken. In support of its motion Luken submits the Moving Affidavit in which Henry S. Luken, the managing member of Luken, asserts that Luken:

... does not own any real property in the State of New York, has no office in New York, does not maintain a New York telephone number, has no equipment in New York, has no employees or independent contractors located in New York, is not qualified to do business in New York, and conducts no business in the State of New York.

Moving Affidavit, ¶ 4. Mr. Luken further asserts:

Luken Communications, LLC does not maintain any bank accounts within the State of New York and does not pay taxes in New York. It does not conduct any marketing or advertising activities specifically directed at New York.

Luken Communications, LLC does not have any agreement or relationship with a company known as My Family TV, LLC, a Florida limited liability company, nor does it have any relationship with My Family TV, Inc., a Florida corporation.

Luken Communications, LLC did not enter into any agreement with such entities, nor did it assume any contractual agreement of any such entity with Plaintiff, Apex Media Sales, LLC.

Luken Communications, LLC has not formed any relationships with customers or contacts of Apex Media Sales, Inc. nor has it communicated with or solicited such customers based upon Apex’s representation of My Family TV, Inc. or My Family TV, LLC.

Id., ¶¶ 5-8.

In response to these allegations, Apex cross-moves for an order directing a continuance of Luken’s motion and disclosure by production of relevant records and an officer of Luken for deposition having knowledge of the business activities of Luken on the grounds “that facts

essential to justify opposition may exist but cannot be stated.” Apex cites *Peterson v Spartan Industries, Inc.*, 33 NY2d 463, 466-68, where the court stated (“[CPLR 3211 (d)] protects the party to whom essential jurisdictional facts are not presently known, especially where those facts are within the exclusive control of the moving party. The opposing party need only demonstrate that facts ‘may exist’ to defeat the motion. It need not be demonstrated that they do exist. This obviously must await discovery. . . . A prima facie showing of jurisdiction is not required.”) Apex contends that it has some information which demonstrates Luken was transacting business in New York, or should reasonably expect its acts to have consequences in New York and that Luken engaged in interstate commerce. See Affirmation of Michael A. Rowe, dated November 4, 2011 (Opposing Affirmation), ¶¶ 4-5. In support of Apex’s contention, Apex submits an affidavit from its chief executive, Marc Krigsman, alleging that as a result of defendants’ soliciting advertising purchasing from Apex clients for My Family TV, Apex lost business. See Affidavit of Marc Krigsman, sworn to on November 3, 2011 (Krigsman Affidavit),

¶ 4. Mr. Krigsman alleges Apex:

. . . had several New York based clients who were purchasing advertising from Plaintiff for MyFamily TV. These clients included Zenith, E&M Advertising, Lockard & Weschler and Razor and Tie. Each of these clients had purchased advertising from Plaintiff to be aired on the MyFamily TV network. Pursuant to the Agreement, Plaintiff received 10% of the advertisement dollars as commission for its sales. However, following the announcement that Luken would handle all future media buys, these clients were no longer able to purchase this advertising from Plaintiff and Plaintiff suffered damages as a result.

Mr. Kringsman identifies these clients as:

E&M Advertising
462 Seventh Avenue, 8th Floor
New York, New York

Razor & Tie
PO Box 505
Cooper Station, New York

Zenith Optimedia
299 Houston St., #10
New York, NY

Lockard & Weschler
2 Bridge Street, Ste. 200
Irvington, New York 10533.

In its reply, Luken counters that it has never done business with MyFamily-**Florida**. Rather, Luken's "relationship is with My Family Television, LLC, a **Tennessee** entity." See Affidavit of Henry G. Luken III, sworn to on November 17, 2011 (Reply Affidavit), ¶ 8 (emphasis added). More to the point, Mr. Luken asserts:

Luken has never handled any advertising sales for the Florida entity, Defendant My Family TV, LLC, that had previously been handled by Apex and has never had any relationship whatsoever with Defendant My Family TV, LLC, the Florida entity that Apex dealt with.

Id., ¶ 9.

In addition, referring to an SEC filing cited by Apex for its assertion that Luken is doing business in New York, Mr. Luken states:

Although Luken provides broadcast facilities and management services for the My Family TV network, Luken has never contracted and does not contract with New York television stations or any other stations to broadcast My Family TV. Rather, it is My Family Television, LLC, a Tennessee entity that is not a

party to this action, which has entered into affiliate agreements to broadcast My Family TV in various markets and assumed previously existing affiliate agreements with television stations to broadcast its programming.

Id., ¶¶ 10-11.¹

Plaintiff's cross-motion for discovery pursuant to CPLR 3211 (d) is denied. Plaintiff has failed to point to evidence that would possibly establish jurisdiction over Luken, the Tennessee entity, the only Luken company sued here. Plaintiff has not made a sufficient showing to allow the case to proceed into discovery relating to the possibility of this court's having jurisdiction over Luken. *See e.g. Marie v Altschuler*, 30 AD3d 271, 272 (1st Dept 2006).

Based on the foregoing, the court concludes the complaint fails to allege facts sufficient to establish jurisdiction over Luken.

Accordingly, it is

ORDERED that plaintiff's motion to dismiss the complaint as against defendant Luken is granted; and it is further

ORDERED that the complaint as against the remaining defendants is severed and the action against them shall continue; and it is further

ORDERED that plaintiff's cross-motion is denied; and it is further

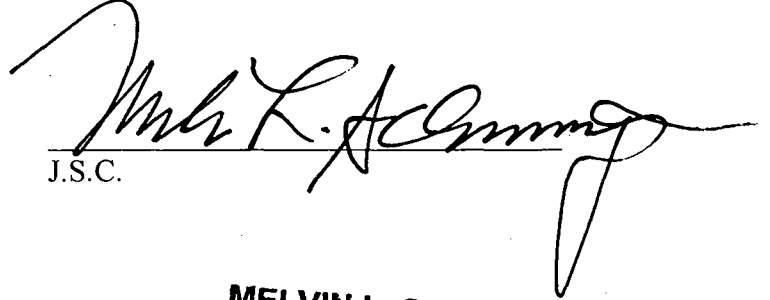
ORDERED that the parties are to appear for a Preliminary Conference on January 23, 2012 at 10 a.m. at 26 Broadway, 10th Floor.

¹In a letter to the court dated November 28, 2011, plaintiff asserts defendants' reply contending that Luken's denial of a relationship with Apex as opposed to the relationship Luken Tennessee entity had with Apex and Apex's alleged customers is new and warrants a sur-reply. The court disagrees. Rather, Luken's reply merely explained in more detail the basis for its CPLR 3211 (a) (3) motion, i.e. that the complaint does not allege, and plaintiff has offered no evidence, of any business conducted by Luken, the Tennessee entity sued in this case, in New York or even that Luken had a business relationship with Apex.

ORDERED that the Clerk shall enter judgment accordingly.

Dated: January 4, 2012

ENTER:

A handwritten signature in black ink, appearing to read "Melvin L. Schweitzer". The signature is written in a cursive style with a large, sweeping initial "M".

J.S.C.

MELVIN L. SCHWEITZER
J.S.C.