

<b>Moyal v Theemasystems, LTD</b>
2012 NY Slip Op 33640(U)
April 10, 2012
Supreme Court, New York County
Docket Number: 109692-2011
Judge: Bernard Fried
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED  
HON. BERNARD J. FRIED Justice  
David Moyal,

E-FILE

PART 60

Plaintiff,  
-against-

INDEX NO. 109692-2011

MOTION DATE \_\_\_\_\_

Theemasystems, LTD, et. al ,  
Defendants

Motion Seq. No. #001  
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

ORDERED that this Motion is DENIED, in accordance with the accompanying memorandum decision, and it is further.

ORDERED that the defendant serve and file an answer to the complaint herein, within 20 days from service of a copy of this order with notice of entry; and it is further

ORDERED, that a Preliminary Conference will be held on this action in Part 60, Room 248, 60 Centre Street, on May 22, 2012, at 9:30 AM.

SO ORDERED

Dated: 4/10/2012

  
HON. BERNARD J. FRIED  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
 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: PART 60

-----X  
DAVID MOYAL d/b/a/ NEXT MAGAZINE,

Plaintiff,

Index No.:  
109692/2011

-against-

THEEMASYSTEMS, LTD, COMPUQUEST, LTD, RONALD  
ENGLISH, DAVID MUNIZ and XYZ CORPORATION,

Defendants.

-----X

**APPEARANCES:**

Attorney for the Plaintiff:  
  
Michael J. Kapin, Esq.  
Michael J. Kapin, P.C.  
305 Broadway, Suite 201  
New York, New York 10007

Attorney for the Defendant, Ronald English:  
  
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Jericho, New York 11753

**FRIED, J.:**

Plaintiff brings this action against TheemaSystems, Ltd., CompuQuest, Ltd., Ronald English, David Muniz and XYZ Corporation, alleging breach of contract and unjust enrichment, stemming from written advertising contracts entered into in 2004 by TheemaSystems, Ltd. and CompuQuest, Ltd. (together "Corporate Defendants") with Plaintiff. Defendant Ronald English ("English") moves to dismiss the complaint as to him pursuant to CPLR 3211(a)(7) and (8).

As a preliminary matter, in considering this motion I will be using the allegations presented both in the complaint and in the accompanying affidavits. “Affidavits may be used freely to preserve inartfully pleaded, but potentially meritorious, claims.” Rovello v. Orofino Realty Co., Inc., 40 N.Y.2d 633, 635 (1976). “The criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.” Leon v. Martinez, 84 N.Y.2d 83, 88 (1994) (holding that the allegations in the complaint and the supporting affidavits were adequate to withstand a motion to dismiss). Therefore, the alleged facts below are taken both from the complaint and the accompanying affidavits.

Briefly, the allegations giving rise to this action are as follows. Plaintiff, David Moyal (“Moyal”), is a founder, owner and operator of Next Magazine, “a gay lifestyle magazine” operating in New York City. (Complaint ¶ 1, Moyal Affidavit ¶ 2). The Corporate Defendants are organizations that operate “a telephone calling service wherein persons throughout the country pay ... for telephone based entertainment products and services.” (Complaint ¶ 8-9). Plaintiff alleges that the phone numbers represent the “true asset” of the Corporate Defendant’s business, as the phone numbers are widely known and used. (Moyal Affidavit ¶ 7). Plaintiff alleges that English and Defendant Muniz (“Muniz”) are “the alter egos” of the Corporate Defendants and the XYZ Corporation, and as such “exercised complete domination” over the acts of the Corporate Defendants that gave rise to this cause of action (Complaint ¶ 10).

Plaintiff alleges that in 2004 the Corporate Defendants entered into written advertising and profit sharing contracts with Moyal. (Complaint ¶ 11-12). Plaintiff alleges that English was instrumental in negotiating the details of the contract, discussing the

transaction with Moyal over the telephone and in person, both in Florida and in New York (Moyal Affidavit ¶ 18-20). Plaintiff alleges that after a certain time period, the Corporate Defendants did not perform under the contracts and fell behind on their payments. (Complaint ¶ 18-19). Plaintiff alleges that he called English to work out a repayment deal and in 2008 Muniz executed the agreed upon repayment agreement under English's specific directions (Moyal Affidavit ¶ 21-22). Plaintiff alleges that there has been no money paid pursuant to that repayment agreement (Complaint ¶ 20).

Plaintiff alleges that after accumulating considerable debt under their contracts with Moyal, the Corporate Defendants transferred their main business assets (telephone lines) to defendant XYZ Corporation ("XYZ Corporation") without appropriate consideration and without observing corporate formalities, in order to avoid their liabilities under the contract. (Complaint ¶ 13-16). Plaintiff alleges that English exercised "complete dominion and control over [this] transfer of assets from the [Corporate Defendants] to the XYZ Corporation" (Complaint ¶ 17). Plaintiff asserts two causes of action against all the Defendants, breach of contract and unjust enrichment, seeking damages of \$560,000. (Complaint ¶ 35).

In support of his motion to dismiss, English argues that New York has no personal jurisdiction as to him, and that Plaintiff failed to state a cause of action for piercing the corporate veil.

With regard to personal jurisdiction, English first argues that he is not a resident of New York and has not been one since 1990, that he does not conduct business in New York, and has no contacts with New York (Motion to Dismiss ¶ 3; English Affidavit from

September 21, 2011). Second, English argues that even though he was the President of the Corporate Defendants, he did not negotiate the disputed contracts with Moyal, and he was not aware of any transactions that took place (Motion to Dismiss ¶ 4). English argues that it is pure speculation to argue that the 2004 contracts and the 2008 debt acknowledgment were done at his direction, because both the contracts and the debt acknowledgment were signed by Muniz (Reply Affirmation ¶ 2, English Affidavit from November 22, 2011 ¶ 9). As a result, English argues that Plaintiff cannot show that either the Corporate Defendants or Muniz were English's agents. (Motion to Dismiss ¶ 6). Finally, English argues that even if he did participate in the contract negotiations, personal jurisdiction over him cannot be asserted based on these actions, because he would have been acting as a corporate officer (Reply Affirmation ¶ 3).

With regard to failure to state a cause of action, English argues that there are no specific allegations regarding the necessary elements of piercing the corporate veil in the Complaint; instead there are only conclusory allegations without any particularized statement of facts. (Motion to Dismiss ¶ 14-15). Furthermore, English argues that there are no allegations that English's conduct was "an abuse of doing business in the corporate form," or that the transfer of assets "was directed toward harming the Plaintiff," or that English committed predatory acts. (Motion to Dismiss ¶ 14; Reply Affirmation ¶ 5).

**(a) Personal Jurisdiction**

To survive a motion to dismiss pursuant to CPLR 3211(a)(8), lack of personal jurisdiction, the plaintiff must establish long-arm jurisdiction over defendant English

pursuant to CPLR 302. Specific personal jurisdiction may be established over a nondomiciliary pursuant to CPLR 302(a)(1) if he, in person or through an agent, conducted some purposeful activities within the State, and there is a substantial relationship between those purposeful activities and the cause of action at issue. SPCA of Upstate N.Y., Inc. v. American Working Collie Assn., 18 N.Y.3d 400, 404 (2012). That “nexus between the business transacted and the cause of action sued upon” is “essential” to the maintenance of a suit against a nondomiciliary. McGowan v. Smith, 52 N.Y.2d 268, 272 (1981).

Here, allegations of English’s extensive involvement in contract negotiations with the Plaintiff are sufficient to establish jurisdiction under CPLR 302(a)(1). A New York court may exercise jurisdiction over a defendant who knowingly initiated and negotiated a substantial transaction with a New York plaintiff, regardless of defendant’s actual location at the time of negotiation. Deutsche Bank Sec., Inc. v. Montana Bd. of Invs., 7 N.Y.3d 65, 72 (2006) (holding there was personal jurisdiction over the Montana-based defendant who called the New York trader and negotiated a \$15 million sale of bonds). Here, Plaintiff alleges that, in 2004, the Corporate Defendants entered into two advertising and profit sharing contracts with Plaintiff in New York. (Complaint ¶ 12). Plaintiff further alleges that English was the decision maker in all matters relating to the business activities of Corporate Defendants, and that there were several telephone conversations and a meeting between the Plaintiff and English in New York, during which these contracts were negotiated. (Moyal Affidavit ¶¶ 11, 18-20). Therefore, by alleging that English had actively participated in contract negotiations with Plaintiff, Plaintiff has sufficiently alleged that English purposefully participated in business activities in New York. Since the present cause of

action arises from the breach of the contracts that English had allegedly negotiated, the necessary nexus between English's purposeful activities and the cause of action has been established.

The fact that English was allegedly negotiating these contracts in his corporate capacity does not eliminate New York's personal jurisdiction over him. The fiduciary shield doctrine has not been adopted in New York and "fiduciaries acting on behalf of a corporation" are subject to New York's long-arm jurisdiction "for acts performed in a corporate capacity". Kreutter v. McFadden Oil Corp., 71 N.Y.2d 460, 470 (1988). Therefore, jurisdiction over English may be established based on the allegations of his extensive negotiations of the business contracts from which the present cause of action has arisen.

Alternatively, English may be subject to New York long-arm jurisdiction under CPLR 302(a)(1) because there are allegations of agents conducting purposeful activities on his behalf in New York. Non-New York domiciliaries are subject to New York long-arm jurisdiction if they purposefully transacted business in this state "by having representatives perform business activities here on their behalf," as long as these business activities were substantially related to the "subject matter of the third party action." Paramount Adjustment Co. v. Home Ins. Co., 267 A.D.2d 151, 151 (1st Dept. 1999). Here, Plaintiff alleges that Muniz acted on behalf of English, both in regular business transactions, and in 2008, when Muniz signed an acknowledgment of the debt owed to the Plaintiff. (Moyal Affidavit ¶ 11, ¶ 22). The lack of repayment under this 2008 debt acknowledgment agreement is part of the Plaintiff's action. Furthermore, Plaintiff alleges that English exercised "complete domination" over the actions of the Corporate Defendants, and that the Corporate Defendants

transferred their assets to another company without obtaining proper consideration (Complaint ¶ 10, ¶ 15). This inappropriate transfer of assets is also the subject matter of Plaintiff's action. Therefore, English is subject to New York long-arm jurisdiction based on the Plaintiff's allegations that English's agents, Muniz and the Corporate Defendants, were acting in New York on his behalf, and that these actions were substantially related to the subject matter of the Plaintiff's action.

Finally, English may be subject to New York long-arm jurisdiction as a result of Plaintiff's piercing the corporate veil allegations. Corcoran v. Haddon S. Fraser Assocs., Ltd., 171 A.D.2d 522, 523 (1st Dep't 1991). Even a less onerous allegation, such that defendant exercised dominion over a corporate entity that is subject to New York jurisdiction, in conjunction with other business contacts by a defendant, may be sufficient to assert personal jurisdiction over a non-domiciliary. Terwin Advisors Group, LLC v. Cameron Fin. Grp. Inc., No. 07-601901, 2008 WL 7563025, at \*2 (N.Y. Sup. Ct. Sep. 23, 2008). Here, there are allegations that at least one of the Corporate Defendants is a New York domiciled corporation, and that English exercised "complete domination" over the Corporate Defendants (Complaint ¶ 2, ¶ 10, ¶ 17). Furthermore, as discussed below, there are sufficient allegations to state a cause of action for piercing the corporate veil. Therefore, English subjected himself to New York long-arm jurisdiction based on his exercise of "complete domination" over a New York domiciled corporation.

**b) Piercing the corporate veil**

On a motion to dismiss pursuant to CPLR 3211(a)(7), failure to state a claim, the complaint is to be liberally construed and the facts alleged therein are accepted as true. 511 West 232<sup>nd</sup> Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152 (2002). A court must accord the plaintiff “the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory.” Sokoloff v. Harriman Estates Development Corp., 96 N.Y.2d 409, 414 (2001). Although the plaintiff is entitled to the benefit of all possible inferences, no such benefits exists when “allegations consist[ ] of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence.” Maas v. Cornell University, 94 N.Y.2d 87, 91 (1999).

In order to state a cause of action for piercing the corporate veil, Plaintiff has to allege that the “corporation was dominated as to the transaction attacked” and that this domination “led to inequity, fraud or malfeasance.” TNS Holdings Inc. v. MKI Sec. Corp., 92 N.Y.2d 335, 339 (1998). A mere claim of “domination, standing alone, is not enough; some showing of a wrongful or unjust act toward the plaintiff is required.” Morris v. New York State Dept. of Taxation and Fin., 82 N.Y.2d 135, 142 (1993). A motion to dismiss for failure to state a cause of action for piercing a corporate veil should be denied if there are allegations that defendant “exercised complete dominion and control over the corporation and ... fraudulently conveyed corporate assets to avoid the corporation’s obligations.” 9 E. 38th St. Assocs. L.P. v. George Feher Assocs., 226 A.D. 2d 167, 168 (1st Dep’t 1996).

Regarding the first element, domination, Plaintiff alleges that English and Muniz were “the alter egos” of Corporate Defendants and the XYZ Corporation, exercising

“complete domination” over these corporations’ actions. (Complaint ¶ 17). In particular, Plaintiff alleges that English “exercised complete dominion and control over the transfer of assets” from the Corporate Defendants to the XYZ Corporation. (Complaint ¶ 17). Furthermore, Plaintiff alleges that the Corporate Defendants transferred their business assets to the XYZ Corporation without observing corporate formalities and without proper consideration. (Complaint ¶ 15-16). Therefore, Plaintiff’s allegations here are sufficient with regards to the domination element.

Turning to the second element, inequity or fraud, Plaintiff alleges that the asset transfer by the Corporate Defendants was done in order to avoid the Corporate Defendants’ obligations under the contracts with the Plaintiff (Complaint ¶ 13). As a result of this transfer, Plaintiff alleges that he was damaged in the amount of \$560,000 (Complaint ¶ 35). This is sufficient concerning the fraud element. Allegations of a defendant abusing its control over a corporation in order to shield assets from creditors are sufficient for stating a claim for piercing of the corporate veil. ABN AMRO Bank, NV v. MBIA Inc., 17 N.Y.3d 208, 229 (2011).

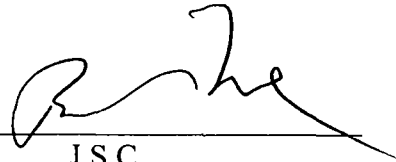
Accordingly, New York has personal jurisdiction over English, and Plaintiff pleaded the necessary elements of piercing the corporate veil. Therefore, English’s motion to dismiss the complaint on lack of personal jurisdiction grounds and on the grounds of failure to state a cause of action is denied.

Accordingly, it is

ORDERED that the motion of defendant English for dismissal of the complaint, pursuant to CPLR 3211(a)(7) and (8), is denied.

DATED: 4/16/2012

ENTER:



J.S.C.

**HON. BERNARD J. FRIED**