

Blum v Spaha Capital Mgt. LLC
2013 NY Slip Op 30964(U)
April 30, 2013
Supreme Court, New York Coutny
Docket Number: 654154/2012
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN
J.S.C.

PART

Index Number : 654154/2012
BLUM, RANDOLPH
vs
SPAHA CAPITAL MANAGEMENT LLC
Sequence Number : 001
SUMMARY JUDGEMENT IN LIEU COMPLAINT

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
Answering Affidavits — Exhibits
Replying Affidavits

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

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

Dated: 4/30/13

CYNTHIA S. KERN
J.S.C.

- 1. CHECK ONE: CASE DISPOSED
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 55

-----X
RANDOLPH BLUM,

Plaintiff,

Index No. 654154/2012

-against-

DECISION/ORDER

SPAHA CAPITAL MANAGEMENT LLC and
JOHN VAN CLIEF,

Defendants.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affirmation in Opposition.....	<u>2</u>
Notice of Cross Motion and Answering Affidavits.....	<u>1</u>
Affirmations in Opposition to the Cross-Motion.....	<u> </u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff commenced the instant action pursuant to Civil Practice Law and Rules (“CPLR”) § 3213 with a summons and notice of motion for summary judgment in lieu of complaint to enforce a default judgment against defendants rendered by the United States District Court in Nevada. Defendants have appeared in this action and oppose plaintiff’s motion on the ground that the Nevada court lacked personal jurisdiction over them. For the reasons set forth below, plaintiff’s motion is denied.

The relevant procedural history is as follows. On or about February 16, 2012, plaintiff commenced suit against defendants in the U.S. District Court of Nevada (the “Nevada Action”) asserting nine causes of action: (1) Breach of Contract; (2) Breach of Fiduciary Duty; (3)

Contractual Breach of the Implied Covenant of Good Faith and Fair Dealing; (4) Tortious Breach of the Implied Good Faith and Fair Dealing; (5) Constructive Fraud; (6) Fraudulent/Intentional Misrepresentation (including sending of fraudulent stock certificate); (7) Constructive Trust; (8) Conversion; and (9) Unjust Enrichment. Neither defendant answered or appeared in the Nevada Action, and on April 17, 2012, plaintiff moved for default judgment, which the U.S. District court granted (the “Judgment”).

On or about November 30, 2012, plaintiff commenced the instant action against defendants with a summons and notice of motion for summary judgment in lieu of complaint to enforce the Judgment in the Nevada Action. Defendants now, for the first time, contend that the Judgment is unenforceable as the court in the Nevada Action lacked personal jurisdiction over them. Thus, the issue to be decided by this court is whether the court had personal jurisdiction over defendants in the Nevada Action.

The relevant facts are as follows. Plaintiff is a resident of Nevada. Neither defendant, on the other hand, resides in Nevada. Defendant Spaha Capital Management LLC (“Spaha”) is a corporation that was formed and maintains offices in New York and defendant John Van Clief, president of Spaha, is a resident of New York.

In 2006, plaintiff invested in a company called Action Skate Parks, Inc. d/b/a Woodward Skateparks (“Woodward Skateparks”). On or about December 13, 2007, Woodward Skateparks filed for Chapter 11 Bankruptcy in Atlanta, Georgia. In October 2008, Spaha purchased Woodward Skateparks through the bankruptcy process. Pursuant to the purchase, Spaha agreed to carry plaintiff’s investment in Woodward Skateparks. According to plaintiff’s complaint, in February 2006, defendants sold plaintiff 246,000 shares of common stock and a warrant of

123,000 of common stock in Spaha and/or Woodward Skateparks. Thereafter, defendants allegedly sent plaintiff certificates totaling 246,000 shares of the stock, but failed to send a certificate for the additional 123,000 shares of stock owed to him per the warrant. Over the next four years, plaintiff allegedly attempted to get defendants to issue the outstanding stock. On June 4, 2010, defendants allegedly sent plaintiff a certificate in the amount of approximately 54,000 common shares of stock, which plaintiff alleges purposefully contained errors to defraud plaintiff. Thereafter, after allegedly several agreements, plaintiff and Spaha finally entered into a contract on or about November 2, 2011, which purported to be the conclusion of all business between Spaha and plaintiff. The contract states:

Payment of \$150,000 is due from Spaha Capital Management, LLC to [plaintiff] on November 7th, 2011. Subsequent payment of an additional \$150,000 to [plaintiff] is due on November 11th, 2011. . . . This close [sic] will conclude all business between Spaha Capital Management, LLC and [plaintiff].

Plaintiff alleges that, to date, defendants have failed to tender any of the money owed.

Pursuant to CPLR § 3213, “[w]hen an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers in lieu of a complaint.” “While a default judgment of a sibling state such as [Nevada] is conclusive on the merits and entitled to full faith and credit in this State, New York courts may address the issue of whether the rendering state had personal jurisdiction over the nonappearing party against whom that judgment was obtained.” *Shulz v. Barrows*, 263 A.D.2d 565 (3rd Dept 1999). The court will not “enforce the underlying foreign judgment where [it determines that] the rendering State lacked personal jurisdiction.” *Id.*

Determining whether the court in the Nevada Action had personal jurisdiction over

defendants requires a two-pronged analysis: (1) whether the requirements of Nevada's long-arm statute were satisfied; and (2) whether the exercise of jurisdiction comports with principles of Federal Due Process. *See City Fed. Sav. Bank v. Reckmeyer*, 178 A.D.2d 503 (2nd Dept 1991). Here, "since Nevada's long-arm statute has been construed to extend to the outer reaches of due process, the two inquires in the instant case may be collapsed into one." *Trump v. Eighth Judicial Dist. Court of State of Nev. in and for County of Clark*, 857 P.2d 740, 747 (Nev. 1993) (citing *Certain-Teed Prods. v. District Court*, 479 P.2d 781, 784 (Nev. 1971)). Thus, the personal jurisdiction question may simply be analyzed under federal due process standards. *See Global Verge, Inc. v. Rodgers*, 2011 WL 70611 (D. Nev. 2011). Due process requires a nonresident defendant to have "minimum contacts" with the forum state sufficient to ensure that exercising personal jurisdiction over him would not offend "traditional notions of fair play and substantial justice." *Arbella Mut. Ins. Co. v. Eighth Judicial Dist. Court ex rel. County of Clark*, 134 P.3d 710, 712 (Nev. 2006). Essentially, "[t]he defendant must have sufficient contacts with the forum such that he or she could reasonably anticipate being haled into court there." *Id.*

The Ninth Circuit and Nevada state courts have separated the personal jurisdiction due process inquiry into two separate areas: general personal jurisdiction and specific personal jurisdiction. *Trump*, 857 P.2d at 748. "General jurisdiction occurs where a defendant is held to answer in a forum for causes of action unrelated to the defendant's forum activities." *Id.* General jurisdiction over a defendant "is appropriate where the defendant's forum activities are so 'substantial' or 'continuous and systematic' that it may be deemed present in the forum." *Id.* (quoting *Budget Rent-A-Car v. District Court*, 835 P.2d 17, 19 (Nev. 1992)). Specific personal jurisdiction, on the other hand, may be established only where the cause of action arises from the

defendant's contacts with the forum." *Id.* The Ninth Circuit uses a three-prong test for analyzing a claim of specific jurisdiction: "(1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable." *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004); *see also Global Verge, Inc. v. Rodgers*, 2011 WL 70611 (D. Nev. Jan. 7, 2011). "The plaintiff bears the burden of satisfying the first two prongs of the test. If the plaintiff fails to satisfy either of these prongs, [specific] personal jurisdiction is not established in the forum state." *Id.*

In the present case, as an initial matter, neither defendant has "substantial" or "continuous and systematic" contacts with Nevada to be subject to general personal jurisdiction there. Defendant Van Clief is a New York resident and Spaha is a New York corporation with no office or direct activities in Nevada. Moreover, plaintiff presents absolutely no evidence that either defendant owns property in Nevada, derives revenues from any goods consumed or services rendered with Nevada or has conducted business in Nevada or engaged in any persistent course of conduct within the state. Thus, defendants' activities, or lack thereof, within Nevada are not "substantial" or "continuous and systematic" such that either defendant may be subject to general personal jurisdiction within Nevada.

Additionally, this court determines that the Nevada court did not have specific personal jurisdiction over defendants in the Nevada Action as defendants' alleged actions giving rise to

plaintiff's claim are insufficient to satisfy the first prong of the specific jurisdiction test. Under the first prong of the test, plaintiff must establish that defendants either "purposefully availed" themselves of the privilege of conducting activities in Nevada or "purposefully directed" their activities toward Nevada. The purposeful availment analysis applies to contract claims and purposeful direction applies to tort claims. See *Schwarzenegger*, 374 F.3d at 802. Here, while plaintiff asserts both contractual and tort causes of action against defendants, a close reading of plaintiff's complaint reveals that plaintiff's suit is really one sounding in contract based upon defendants' alleged breach of the November 2, 2011 agreement. The only damage plaintiff alleges he sustained is the amount of \$300,000, which is the amount owed pursuant to the contract. Plaintiff simply fails to allege any damage or effect stemming from the sending of the allegedly fraudulent stock certificates. Thus, because this suit sounds in contract, this court will conduct a purposeful availment analysis.

Taking into account the above principles, this court determines that in the present case neither defendant has purposefully availed itself of the Nevada forum to be subject to specific personal jurisdiction there. "A showing that a defendant purposefully availed himself of the privilege of doing business in a forum state typically consists of evidence of the defendant's action in the forum, such as executing or performing a contract there." *Id.*; see also *Global Verge*, 2011 WL 70611 at *5. While plaintiff argues that both defendants purposefully availed themselves of the Nevada forum by entering into contracts with a Nevada resident, such argument is unavailing. As an initial matter, while plaintiff's complaint and motion papers continuously use the word "contracts," the only contract attached to its complaint or which it explicitly identifies is the November 2, 2011 agreement wherein defendant agreed to pay plaintiff

a total of \$300,000. This contract was not executed in Nevada, negotiated in Nevada nor did it require any performance in Nevada. While the contract required defendants to send money to a bank account located in Nevada, the alleged breach of the contract –i.e. not sending the money–would have occurred in New York, not Nevada. Simply entering a contract with a resident of a certain state is insufficient contact with the state to conclude that defendant “purposefully availed” itself of the forum when there exists no other relation to the forum. The cases relied upon by plaintiff are inapposite. *See Arbella*, 134 P.3d 710; *Trump*, 857 P.2d 740. In *Arbella*, the court found personal jurisdiction over the non-resident insurance company on the ground that its insurance contract with plaintiff provided “nationwide” coverage, which included coverage in Nevada. Thus, it concluded, plaintiff had purposefully availed itself of the Nevada forum by contracting with the plaintiff to provide coverage in Nevada and by contracting for such coverage, it could “reasonably have anticipated” that litigation could result in Nevada stemming from an accident in Nevada. *Arbella*, 134 P.3d at 713-14. Similarly, in *Trump*, the court concluded that the non-resident defendant should have reasonably anticipated being hauled into court in Nevada as the employment contract upon which the suit was brought “created a Nevada trust with a Nevada choice-of-law provision.” *Trump*, 857 P.2d at 750. In contrast, the contract at issue in the present case does not contain terms which anticipate action in Nevada nor does it contain a provision adopting Nevada law; instead, the only connection with Nevada is that it was made with a Nevada resident.

As plaintiff has failed to meet its burden of presenting sufficient evidence to meet the first prong of the specific personal jurisdiction test, the court need not address the remaining two. Additionally, as the court has established that the court in Nevada did not have personal

