SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 651965/2012
NAVITAS GROUP, INC.
vs.
CERMED CORPORATION, INC.
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE 7/23/13
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). 4-10
Answering Affidavits — Exhibits _____ | No(s). 18
Replying Affidavits _____ | No(s). _____

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Dated: 10/31/13

SHIRLEY WERNER KORNREICH J.S.C.
J.S.C.

1. CHECK ONE: ..... CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED w/leave to replead ☐ 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 54

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THE NAVITAS GROUP, INC.,

Index No.:651965/2012

Plaintiff,

DECISION AND ORDER

-against-

CERMED CORPORATION, INC., CERMED INTERNATIONAL, INC., CERMED DELAWARE, PETER GOMBRICH, ERIC GOMBRICH, KEN HOLBROOK, JIMMY LEE, IRENE PODOLAK, MARY RUBERRY and BLAINE RIEKE,

Defendants.

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KORNREICH, SHIRLEY WERNER, J.:

Defendants move to dismiss the instant action for lack of personal jurisdiction. Plaintiff opposes. For the reasons that follow, the motion is granted and the complaint is dismissed with leave to replead.

I. Background

Plaintiff, a New York corporation, is a boutique business engaged in "establishing financial investment vehicles for startup entities" (affidavit of Steve Hoffman, sworn to March 28, 2012, ¶ 5). Defendant CerMed Corporation, Inc. (CerMed), is a medical device company incorporated in Delaware (amended complaint, ¶ 2) and doing business in New York. In or around February 2011, CerMed reached out to plaintiff and the parties negotiated and entered into a number of written agreements (*id.* at ¶ 19; Hoffman affidavit ¶ 5). The venue for the negotiations is disputed, but since this is a dismissal motion, the court credits plaintiff's assertion for this motion. According to plaintiff Cermed visited New York at least once and continued negotiations over Skype, fax and

the telephone (Hoffman affidavit, ¶ 11). Further disputed is a provision in the agreement making New York law controlling. Plaintiff stands on that provision, and defendants argue that the provision was inserted after Cermed executed the contract.

The agreements provided that plaintiff would facilitate the listing of CerMed on the public exchange in Frankfurt, Germany by acquiring a public shell company into which CerMed could then merge; in exchange, plaintiff would receive a monthly consulting fee, reimbursement of expenses, and retain a 15% equity interest in the company after the merger (amended complaint, ¶¶ 18, 22). Pursuant to plan, plaintiff paid approximately $350,000 to acquire a public shell corporation named SM Prime Holdings, Co. Ltd. (SM Prime), becoming its sole shareholder (amended complaint, ¶¶ 21–22). CerMed then merged into SM Prime, changed the shell's name to CerMed International, Inc. (CerMed International), and was listed on the Frankfurt exchange after a public offering in Germany (*id.* at ¶ 24). During this process, plaintiff incurred approximately $75,000 in legal fees (*id.* at ¶ 27).

After the listing CerMed engaged in a "reverse stock split," which, according to the complaint, had the effect of "greatly diluting" plaintiff's interest (*id.* at ¶ 28). Moreover, in June 2011, CerMed informed plaintiff that it intended to "cancel" plaintiff's shares in CerMed International (*id.* at ¶ 30). Some months later, plaintiff demanded that defendants reimburse it for the cost of acquiring SM Prime (*id.* at ¶ 53). Defendants did not respond (*id.* at ¶ 54).

Plaintiff commenced this action in June 2012 by filing a summons and complaint; an amended summons and complaint was filed on August 9, 2012. The complaint seeks a money judgment of at least $4,705,000 against CerMed, its related entities and its directors (named herein as individual defendants), asserting causes of action for fraud, conversion, unjust enrichment and

breach of fiduciary duty.[1] It also seeks a judgment declaring the validity of plaintiff's CerMed International shares.

Defendants responded with the instant motion, moving to dismiss pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction. In support, defendants submitted the affidavit of Peter Gombrich, CerMed's chairman and chief executive officer (affidavit of Peter Gombrich, sworn to on December 27, 2012, ¶ 2). Mr. Gombrich avers that since its formation in 2008, CerMed has been based in California and has never had any office or representative in New York (Gombrich affidavit, ¶¶ 3–4). He similarly states that CerMed "does not transact, and has never transacted, business or sales activities" in New York (*id.* at ¶ 4). He explains that CerMed International is incorporated in Ontario, Canada, does not have any office or representative in New York and does not conduct any business there (*id.* at ¶¶ 6–7). Finally, Gombrich maintains that none of the individual defendants reside in New York, nor have they conducted business on behalf of CerMed in New York (*id.* at ¶ 5).[2]

II. Standard

Where a defendant has moved to dismiss pursuant to CPLR 3211(a)(8), it is the plaintiff's burden to prove the court has jurisdiction (*Copp v Ramirez*, 62 AD3d 23, 28 [1st Dept 2009] *citing Bunkoff Gen. Constr. v State Auto. Mut. Ins. Co.*, 296 AD2d 699, 700 [3d Dept 2002]). However, if the plaintiff shows that facts justifying the exercise of jurisdiction may exist but are not presently

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[1] "Piercing the corporate veil," asserted as plaintiff's fifth cause of action, is not a cause of action at all, but rather a theory under which the corporate form is set aside to hold shareholders liable for the corporation's activities.

[2] Gombrich further denies knowledge of and any affiliation with the defendant corporation named herein as "CerMed Delaware" (Gombrich affidavit, ¶ 9).

in its possession, then the court may direct that discovery take place to explore the issue (CPLR 3211[d]; *Peterson v Spartan Indus., Inc.*, 33 NY2d 463, 466–67 [1974]).

III. Discussion

Plaintiff argues that the amended complaint adequately alleges that defendants committed fraud, a tortious act that justifies the assertion of jurisdiction (amended complaint ¶ 15; affirmation of Jacob J. Schindelheim, March 28, 2013 ¶¶ 30–33). New York's long-arm statute authorizes the courts to exercise jurisdiction over a non-domiciliary where such person "commits a tortious act within the state [or] commits a tortious act without the state causing injury to person or property within the state" (CPLR 302[a]).

As a threshold matter, to obtain jurisdiction under these provisions a plaintiff must adequately plead a cause of action sounding in tort rather than contract (*Fantis Foods, Inc. v Standard Importing Co.*, 49 NY2d 317, 324 [1980]; *Amigo Foods Corp. v Marine Midland Bank-N.Y.*, 39 NY2d 391, 396 [1976]; Vincent C. Alexander, Practice Commentary, McKinney's Cons Laws of NY, Book 7B, CPLR C302:5; 2 Commercial Litigation in New York State Courts § 2:23 [3d ed 2010]). It is not at all clear that plaintiff has done so here. To the extent that allegations giving rise to a cause of action for fraud can actually be discerned in the amended complaint (itself a worrisomely difficult task) it appears that plaintiff is alleging that it was misled as to "the equity interests to be provided to [it] in CERMED and the expenses which CERMED was to pay to [p]laintiff" (amended complaint, ¶ 46). But plaintiff has already alleged that the expense reimbursement and the promised equity interest was part of the "various written agreements" it had reached with defendant (*id.* at ¶¶ 17–22). It would appear, then, that plaintiff's (extremely sparse) fraud allegations merely amount to a claim that defendants did not abide by their contract with

plaintiff.[3] This is insufficient to sustain a fraud claim (*Schulman v Greenwich Assocs., LLC*, 52 AD3d 234, 234 [1st Dept 2008] *quoting Eastman Kodak Co. v Roopak Enters., Ltd.*, 202 AD2d 220, 222 [1st Dept 1994]). As a result, the allegation that defendants failed to uphold their promises regarding plaintiff's equity interests and expense reimbursements does not sound in tort at all, and jurisdiction cannot be asserted with respect to these allegations under CPLR 302(a)(2) or (3) (*see World Sports Group, Inc. v Motion Picture Academy of Arts & Sciences*, 273 AD2d 53, 54 [1st Dept 2000]).

Similar problems afflict plaintiff's third and fourth causes of action, for conversion and unjust enrichment, respectively. Conversion is the unauthorized assumption of ownership over goods or identifiable money belonging to another (*Peters Griffin Woodward, Inc. v WCSC, Inc.*, 88 AD2d 883, 883 [1st Dept 1982]). An action for conversion cannot be predicated on a mere breach of contract (*Kopel v Bandwidth Tech. Corp.*, 56 AD3d 320, 320 [1st Dept 2008]; *Fesseha v TD Waterhouse Inv. Servs., Inc.*, 305 AD2d 268, 269 [1st Dept 2003]; *Peters Griffin Woodward, Inc.*, 88 AD2d at 884). It also is well established that an unjust enrichment claim is barred by the existence of a valid contract governing the subject matter (*Pappas v Tzolis*, 20 NY3d 228, 234 [2012]; *Adelaide Prods., Inc. v BKN Intl. AG*, 38 AD3d 221, 225 [1st Dept 2007]; *Singer Asset Fin. Co. v Melvin*, 33 AD3d 355, 358 [1st Dept 2006]). Here, the asserted bases for these causes of action are defendants' failure to reimburse plaintiff for the cost of acquiring SM Prime, or to otherwise abide by the terms of the parties' agreement (amended complaint, ¶¶ 51–54, 62–63 ["Defendants callously failed and refused to observe, honor and comply with their obligations under the Agreement"]). These are allegations of breach of contract, not tort, and plaintiff cannot

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[3] The complaint certainly does not describe with the requisite specificity any *other* statement by defendants which could serve as a basis for a fraud claim (*see* CPLR 3016[b]).

wish itself into the desired subsection of the long-arm statute by pretending otherwise (*see Trafalgar Capital Corp. v Oil Producers Equip. Corp.*, 555 Fsupp 305, 310 [SDNY 1983] ["plaintiff is merely attempting to transform a breach of contract into a tort for jurisdictional purposes. Such characterizations are not a basis to ground jurisdiction under New York's long-arm statute"]).

What remains are causes of action for breach of fiduciary duty and declaratory judgment, which assert that CerMed and the individual defendants, as the directors of CerMed and the majority shareholder of CerMed International, owed plaintiff certain fiduciary duties which they failed to uphold, accusing defendants of self-dealing, failure to disclose material information, failure to maintain adequate books and records, and improperly attempting to cancel plaintiff's existing shares in CerMed International.[4] However, the alleged fiduciary duties only *began* with CerMed's merger with SM Prime some time after March 2, 2011 (*id.* at ¶¶ 23–24). The only activity *within* New York that plaintiff has invoked as a basis for long-arm jurisdiction is the negotiation of the alleged agreements, some of which supposedly took place in face-to-face meetings in this state. These negotiations, of course, preceded both the contract and the merger, and so cannot have constituted a breach of fiduciary duty. Rather, plaintiff's claim for breach of fiduciary duty and for a declaratory judgment is based on decisions made by a Delaware corporation and its directors, all operating out of California, regarding a Canadian corporation listed on a stock exchange in Germany. The only connection between defendants and New York in this regard is that the shareholder claiming injury is domiciled in New York. This is insufficient for the court to assert jurisdiction over defendants for these claims (*Fantis Foods, Inc.*, 49 NY2d at

[4] Plaintiff also asserts that defendants have withheld the distribution of profits (amended complaint, ¶¶ 55–56).

326–27 ["It has long been held that the residence or domicile of the injured party within the State is not a sufficient predicate for jurisdiction"]; *Weiss v Greenburg, Traurig, Askew, Hoffman, Lipoff, Quentel & Wolff, P.A.*, 85 AD2d 861, 861–62 [3d Dept 1981]). Plaintiff has not made even a "sufficient start" in showing that other facts not in its possession may exist which would justify ordering jurisdictional discovery.

IV. Conclusion

In short, plaintiff has failed to carry its burden of justifying this court's exercise of jurisdiction over the out-of-state defendants based on its alleged tort claims. Its sole argument, that jurisdiction is justified under CPLR 302(a)(2) or (3), fails, as the bulk of the complaint appears to actually allege breach of contract, which plaintiff has chosen to mischaracterize as a tort. Jurisdiction over these claims might be possible under CPLR 302(a)(1). Accordingly, it is

ORDERED that defendants' motion to dismiss is granted and the complaint is dismissed; and it is further

ORDERED that plaintiff is granted leave to serve a second amended complaint as to replead the second, third and fourth causes of action as breach of contract within 20 days after service on plaintiff's attorney of a copy of this order with notice of entry; and it is further

ORDERED that, in the event plaintiff fails to serve and file a second amended complaint in conformity herewith within such time, the Clerk, upon service of a copy of this order with notice of entry and an affirmation by defendants' counsel attesting to such non-compliance, is directed to enter judgment dismissing the action, with prejudice.

Dated: October 31, 2013

ENTER:

J.S.C.