

Diraimondo v Calhoun
2013 NY Slip Op 34009(U)
January 14, 2013
Supreme Court, Nassau County
Docket Number: 9378/12
Judge: Jeffrey S. Brown
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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE**

-----X **TRIAL/IAS PART 17**

**MICHAEL P. DIRAIMONDO, WILLIAM CHILDS,
ROBERT PETERS and CHARLENE VAUGHAN,
individually and derivatively on behalf of AMERICAN
VIRGIN ENTERPRISES, LTD.,**

**INDEX # 9378/12
Motion Seq. 1
Motion Date 10.12.12
Submit Date 10.26.12**

Plaintiff(s),

-against-

**RORY CALHOUN, THEODORE E. STAIR, AMERICAN
VIRGIN ENTERPRISES, LTD., SIRIUS DEVELOPMENT,
LLC and T-REX ST. JOHN LLC.,**

Defendant(s).

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The following papers were read on this motion:

Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	1
Answering Affidavit	2
Reply Affidavit.....	3
Memorandum of Law.....	4

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Defendants move for an order dismissing the plaintiffs' causes of action against defendant T-Rex St. John, LLC (T-Rex) based on lack of personal jurisdiction.

American Virgin Enterprises, Ltd. ("AVE 1987") was a New York corporation formed in 1987 for the purpose of developing a marina in the U.S. Virgin Islands on land leased from the Virgin Islands Port Authority. Defendant Stair was the president and a shareholder of AVE 1987. Defendant Calhoun was the treasurer and a shareholder of AVE 1987. Plaintiff Childs was the vice president and a shareholder of AVE 1987. Plaintiff DiRaimondo was the secretary and a shareholder of AVE 1987.

In 1993, AVE 1987 was dissolved for failure to pay franchise taxes. In 1994, the Moravian Church commenced an action in the Virgin Islands against AVE 1987 and the Virgin Islands Port Authority, claiming it owned the property on which AVE 1987 had intended to develop the marina.

In 2001, another entity named American Virgin Enterprises, Ltd. (AVE 2001) was formed to succeed AVE 1987 and act in its stead. None of the plaintiffs were shareholders of AVE 2001, but defendant Calhoun was its president and a shareholder and defendant Stair was vice president, treasurer and a shareholder.

In 2004, the action by the Moravian Church was decided in its favor, when the court found that it owned the property which AVE 1987 had leased for development of the marina. The Moravian Church and defendant Calhoun, on behalf of AVE 1987, mutually released each other from all claims asserted in the action.

In 2005, defendant Sirius Development, LLC (Sirius), a Virgin Islands limited liability company, was formed with defendant Calhoun as its managing member. In 2006, defendant Sirius entered into a 99 year lease with the Moravian Church for the purpose of developing a project on its property. Defendant Sirius, along with T-Rex Member St. John LLC, a Delaware limited liability company, formed defendant T-Rex, a Virgin Islands limited liability company, and defendant Sirius assigned the lease to defendant T-Rex.

The plaintiffs commenced this action against the defendants alleging that they breached their fiduciary duties and usurped and diverted a corporate opportunity from AVE 1987 through the fraudulent misrepresentations and omissions of defendant Calhoun.

While defendants Calhoun, AVE and Sirius have answered the complaint, the defendants move to dismiss the complaint as against defendant T-Rex for lack of personal jurisdiction.

The burden of proving personal jurisdiction rests with the party asserting it. In deciding whether the plaintiffs have met their burden of proof and made out a prima facie case of personal jurisdiction, the court must construe the pleadings and the affidavits in the light most favorable to the plaintiffs and resolve all doubts in the plaintiffs' favor (*Brandt v Toraby*, 273 AD2d 429 [2d Dept 2000]).

In their complaint, the plaintiffs allege that defendant T-Rex is a foreign limited liability company, which fact the defendants confirm. Service of process alone is insufficient to obtain personal jurisdiction over a non-domiciliary defendant. In order to obtain personal jurisdiction over a non-domiciliary, there must be a jurisdictional predicate, as well as proper service.

[* 3]

CPLR 302, the long arm statute, provides in relevant part that a court may exercise personal jurisdiction over any non-domiciliary, who in person or through an agent: transacts any business within the state or contracts anywhere to supply goods or services in the state; or commits a tortious act within the state; or commits a tortious act without the state causing injury within the state, if the non-domiciliary regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in the state, or expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or owns, uses or possesses any real property situated within the state.

Plaintiffs fail to allege that defendant T-Rex has transacted or done any business in New York or committed any tortious act within New York. Defendant T-Rex was formed in the Virgin Islands, holds a lease on property in the Virgin Islands and appears to have conducted any and all of its business in the Virgin Islands and Florida. The only contact that T-Rex might possibly have with New York is that defendant Calhoun is the managing member of defendant Sirius, and defendant Sirius is a member of T-Rex, which assigned the subject lease in the Virgin Islands to T-Rex.

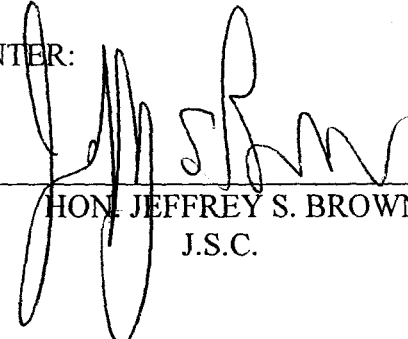
While personal jurisdiction under CPLR 302 may be obtained if a non-domiciliary acts through an agent, to sustain this burden, the plaintiffs must establish that the agent engaged in purposeful activities in New York for the benefit of T-Rex and that T-Rex exercised sufficient control over such agent. Conclusory allegations of agency, with no supporting evidentiary facts establishing control, are insufficient to establish personal jurisdiction (*Polansky v Gelrod*, 20 AD3d 663 [3d Dept 2005]).

While the plaintiffs argue that defendant T-Rex is chargeable with defendant Calhoun's alleged fraudulent intent, plaintiffs fail to allege any of the elements necessary to establish an agency relationship between defendant Calhoun and defendant T-Rex. There is no indication that defendant Calhoun's alleged representations to the plaintiffs about the status of the development in the Virgin Islands were made on behalf of defendant T-Rex.

Neither the plaintiffs' complaint, nor the attorney's affirmation offered in opposition to the defendants' motion to dismiss, even when construed in the light most favorable to the plaintiffs, allege a sufficient basis to afford this court jurisdiction over non-domiciliary defendant T-Rex. Accordingly, the defendants' motion to dismiss the plaintiffs' complaint as against defendant T-Rex is **GRANTED**.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
January 14, 2013

ENTER:

HON. JEFFREY S. BROWN
J.S.C.

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ENTERED
JAN 18 2013
NASSAU COUNTY
COUNTY CLERK'S OFFICE