

Acupay Sys. LLC v Perlaza

2014 NY Slip Op 30982(U)

April 4, 2014

Sup Ct, New York County

Docket Number: 654545/12

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

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ACUPAY SYSTEM LLC and ACUPAY S.L.U.,

Plaintiffs,

-against-

Index No. 654545/12

JUAN CARLOS PERLAZA (A/K/A JOHN
PERLAZA) MELINA MARTA BOBBIO, and
ISSUER SOLUTIONS, S.L.,

DECISION AND ORDER

Defendants.

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For Plaintiffs:
Jones Day
222 East 41st Street
New York, NY 10017

For Defendant Issuer Solutions, S.L.:
Arrufat Gracia, PLLC
130 West 42nd Street, Suite 705
New York, NY 10036

HON. SALIANN SCARPULLA, J.:

In this action for tortious interference with contract and tortious interference with (prospective) business relations, defendant Issuer Solutions, S.L. (“Issuer”) moves, pursuant to CPLR 3211 (a) (7) and (8) and CPLR 327, for an order dismissing the complaint for lack of personal jurisdiction and inconvenient forum grounds (motion sequence no. 001). Plaintiff Acupay System LLC (“Acupay”) and its wholly owned Spanish subsidiary, Acupay S.L.U. (collectively “plaintiffs”) move, pursuant to CPLR 3211(d), for an order staying Issuer’s motion pending completion of jurisdictional discovery (motion sequence no. 002). Motion sequence nos. 001 and 002 are consolidated for disposition.

In their complaint, as augmented by the affidavit of Robert C. Apfel, the president of Acupay, plaintiffs allege that Acupay's business is primarily "to provide tax compliance, tax relief and [. . .] tax certification services for U.S. investors holding securities issued by foreign issuers of debt securities and hybrid securities in the U.S. markets." These services, plaintiffs allege, are based on electronically tracking the interest, or dividend, payments that are made to the holders of foreign debt securities. The issuers of the securities then need not withhold local income taxes on the payments, where the laws of the foreign country do not require American investors to pay such taxes. Acupay asserts that its services make foreign debt securities more attractive to U.S. investors, and, accordingly, Acupay's principal clients have been foreign issuers of securities.

Plaintiffs further allege that defendant Juan Carlos Perlaza ("Perlaza"), a former employee of Acupay, who is a citizen of Colombia and the United Kingdom, and who lives in Valencia, Spain, formed Issuer. Perlaza subsequently hired defendant Melina Bobbio ("Bobbio"), also a former employee of Acupay, who is a citizen of Italy and Argentina, and who resides in Buenos Aires, Argentina. Plaintiffs claim that, beginning in 2011 or 2112, Issuer began to compete with Acupay, and "took steps to induce Acupay's clients to breach their contracts with Acupay."

Plaintiffs also allege that "acting in the name of Issuer Solutions, Perlaza and Bobbio have solicited plaintiffs' clients in Spain and elsewhere . . . ," and that Issuer

“solicited and secured the business of the Spanish telecommunications firm Telefonica S.A., Bank Santander, and Banco Bilbao Vizcaya Argentaria.” Finally, plaintiffs claim that “[d]efendants’ interference with Acupay’s contracts and business relations also have interfered with the contracts, business and business relations of Acupay S.L.U. because Acupay S.L.U.’s business of providing fee-based services to investors of foreign issuers is based upon Acupay’s underlying contracts with those issuers.”

In support of the motion to dismiss for lack of personal jurisdiction, Issuer argues that: (1) the complaint fails to allege an injury within New York; (2) plaintiffs failed to effect proper service upon Issuer; (3) the exercise of personal jurisdiction would not comport with due process, under either the Fourteenth Amendment of the Constitution of the United States or Article 1 § 6 of the Constitution of New York, because Issuer has no contacts with New York; (4) New York is an inconvenient forum; and (5) although Spanish law will apply, the complaint fails to allege any provisions of Spanish law that were violated.

In opposition, plaintiffs argue that this court has personal jurisdiction over Issuer, a company organized under the laws of Spain, with a principal place of business in Valencia, Spain, on the basis of CPLR 302 (a) (3). Plaintiffs also assert that Issuer’s moving affidavit is insufficient due to its internal inconsistencies and untrue statements, and that Issuer does do business in New York sufficient for purposes of due process. In addition, plaintiffs argue that Issuer’s *forum non conveniens* arguments are weak, and that

the complaint sufficiently states a cause of action for tortious interference with contractual relations.

In support of their assertion that there is basis for jurisdiction pursuant to CPLR 302(a)(3), plaintiffs maintain that the injury to Acupay occurred in New York, and refer to Acupay's contracts with its clients, which are governed by New York law, call for dispute resolution in New York, and involved JPMorgan Chase Bank (a New York entity) as a party.

Discussion

CPLR §302(a)(3) provides that a court may exercise jurisdiction over a non-domiciliary defendant who “commits a tortious act without the state causing injury to person or property within the state . . . , if he . . . (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce[.]”

Jurisdiction pursuant to this provision is based on five elements: “First, that defendant committed a tortious act outside the State; second, that the cause of action arises from that act; third, that the act caused injury to a person or property within the State; fourth, that defendant expected or should reasonably have expected the act to have consequences in the State; and fifth, that defendant derived substantial revenue from interstate or international commerce.” *LaMarca v. Pak-Mor Mfg. Co.*, 95 N.Y.2d 210, 214 (2000).

“In the context of a commercial tort, where the damage is solely economic, the situs of commercial injury is where the original critical events associated with the action or dispute took place, *not where any financial loss or damages occurred.*” *CRT Invs., Ltd. v. BDO Seidman, LLP*, 85 A.D.3d 470, 471-472 (1st Dep’t 2011) (emphasis added). *See also O’Brien v. Hackensack Univ. Med. Ctr.*, 305 A.D.2d 199 (1st Dep’t 2003). In *CRT Invs., Ltd.*, the plaintiffs asserted causes of action for fraud, aiding and abetting fraud, negligence, and gross negligence against outside auditors for failing to disclose that the hedge fund in which they invested was ultimately managed by Bernard Madoff. In rejecting plaintiffs’ claim of personal jurisdiction under CPLR 302(a)(3), the First Department held that “[p]laintiff’s claim that it was sold the investment in New York is irrelevant, because the injury did not arise out of its purchase of the investment here, but, rather, out of [defendant’s] alleged failure to appropriately perform its audit services,” which were performed were in the Cayman Islands. *Id.* *See also Benefits By Design Corp. v. Contractor Mgt. Servs., LLC*, 75 A.D.3d 826, 830 (3d Dep’t 2010) (“The critical events allegedly constituting defendant’s breach of duty – that is, its alleged failure to properly inspect the documents before releasing the escrow funds – took place entirely in Arizona; thus, there was no basis shown supporting long-arm jurisdiction under CPLR 302 (a) (3)”; *Marie v. Altschuler*, 30 A.D.3d 271, 272 (1st Dep’t 2006) (situs of alleged injury was California, where alleged conspiracy was formed); *Mid-Atlantic Residential Investors Ltd. Partnership v. McGuire*, 166 A.D.2d 205, 206-207 (1st Dep’t 1990)

(alleged misrepresentations which caused defendant to sign promissary note, on which he defaulted, were made in California, and therefore “the situs of the injury must be deemed to be California, where all the critical events associated with this dispute occurred”); *Weiss v. Greenberg, Traurig, Askew, Hoffman, Lipoff, Quentel & Wolff, P.A.*, 85 A.D.2d 861, 862 (3d Dep't 1981) (noting that “the situs of a nonphysical, commercial injury is where the critical events associated with the dispute took place,” court found that because “any alleged acts of legal malpractice took place in Florida, and were related to a security interest in Florida property, it cannot be said that injury was sustained in New York”) (internal citations omitted).

Plaintiffs' assertion here that there is jurisdiction over Issuer is incorrectly premised on Acupay's general connections to New York. Thus, plaintiffs rely on the fact that Acupay's contracts with its clients are governed by New York law, call for New York dispute resolution, involve a New York entity, require communications with the Depository Trust Company in New York, and require Acupay to perform its contracts in New York. That Acupay's contracts were centered in New York and require Acupay to do its work in New York is not relevant to the situs of injury determination. Rather, the relevant inquiry is where the original critical events associated with the alleged tortious action took place – where did Issuer act to interfere with Acupay's contracts and business relations, not the location of the resultant harm. *CRT Invs.*, 85 A.D.3d at 471-472; *see also Biz2Credit, LLC v. IFMR Trust*, 2010 N.Y. Misc. LEXIS 1457 (Sup. Ct. N.Y. Co.

2010) (complaint alleges that defendant interfered with plaintiff's business relationships in India; plaintiff failed to establish that the tortious act caused injury within New York).

Plaintiffs acknowledge that "the principle off-shore activity here is that some of Acupay's clients are in Spain and that Issuer Solutions presumably met with them there to induce them to breach their contracts." While plaintiffs attempt to down play this off-shore activity, these alleged actions by Issuer to induce Acupay's clients to breach their contracts constitute the critical events constituting the tortious interference, and therefore the situs of the injury. In fact, plaintiffs make no allegations that Issuer met with any of Acupay's clients in New York, or otherwise acted to interfere with Acupay's contracts and/or business relations in New York.¹

Citing *Iconoclast Advisers LLC v Petro-Suisse, Ltd.* (17 Misc 3d 1101[A], 2007 NY Slip Op 51784[U] [Sup Ct, NY County 2007]) and *DiStefano v Carozzi N. Am., Inc.* (286 F3d 81 [2d Cir 2001]), Acupay argues that damages suffered as the result of a tortious interference with contract are located where the plaintiff is prevented from performing the contract. *DiStefano* is clearly distinguishable. The plaintiff there did not

¹In opposition, plaintiffs submit exhibits 12 and 14 to Mr. Apfel's affidavit, which plaintiffs assert show Issuer's meddling with Acupay's client, Telefonica Emisiones, S.A.U., and Issuer's attempt to solicit information pertaining to another Acupay client, Banco Bilbao Vizcaya Argentaria. These documents show that Issuer sought to ascertain the identity of Spanish, not United States, recipients of interest or dividends from those companies. Such activity appears to be consistent with Spanish Royal Decree 1145/2011 "which eliminated the obligation to identify and certify the fiscal residence of investors in international debt issued by Spanish entities."

allege tortious interference, or any other traditional commercial tort where the alleged damage is solely economic, but, rather, discrimination on the basis of national origin, in violation of both the New York State and the New York City Human Rights Laws. The Court held that the "original event" giving rise to his cause of action was his removal from his job in New York, even though the decision to fire him had been made in New Jersey. *DiStefano* is therefore not applicable here.

To the extent that *Iconoclast Advisers* can be read to hold that the situs of commercial economic injury is where the allegedly interfered with contract was to be performed, rather where the critical events surrounding the dispute occurred, this Court respectfully disagrees with *Iconoclast Advisers*. See *Iconoclast Advisers*, 17 Misc. 3d at 1101(a). In a tortious interference cause of action, as noted above, "[i]n the context of a commercial tort, where the damage is solely economic, the situs of commercial injury is where the original critical events associated with the action or dispute took place, not where any financial loss or damages occurred." *CRT Invs., Ltd.*, 85 AD3d at 471-472. See also *Kargo, Inc. v. Pegaso PCS, S.A.*, 2008 U.S. Dist. LEXIS 57472, n. 6 (S.D.N.Y. July 28, 2008).

Accordingly, the loss of out-of-state customers by a New York company in and of itself does not suffice as a basis for personal jurisdiction, pursuant to CPLR 302 (a) (3). See *Daniel B. Katz & Assoc. v Midland Rushmore, LLC*, 90 AD3d 977, 980 (2d Dept 2011) (affirming dismissal of claims alleging tortious interference with contract and

future business, where New York real estate broker, suing in connection with fees allegedly owed for procuring tenants for out-of-state shopping centers, alleged that out-of-state defendant made misrepresentations about one of the centers).

Here, while Acupay argues that its contracts are governed by New York law, and that it necessarily performs those contracts largely in New York, it alleges no specific injury in New York, other than economic damages. Consequently, the situs of the "original critical events associated with the action or dispute" (*CRT Invs., Ltd. v BDO Seidman, LLP*, 85 AD3d at 471-472) may be located in Spain and, perhaps, in Argentina, but not in New York.

In addition, plaintiff Acupay S.L.U., a Spanish company, alleges harm derivative of Acupay's harm. Plaintiffs alleges that Acupay S.L.U.'s allegation of tortious interference stems from its "business of providing . . . services to investors of foreign issuers [] based upon Acupay's underlying contracts with those issuers." In support of the claim that there is jurisdiction pursuant to CPLR 302(a)(3) over Acupay S.L.U., plaintiffs assert that "Acupay S.L.U. has suffered an [sic] New York injury because it is only able to engage in its business because of Acupay's contracts with the issuers." Acupay S.L.U. does not allege any direct injury as a result of Issuer's alleged tortious interference. There is nothing to suggest that Acupay S.L.U. suffered any direct harm by Issuer's alleged tortious interference sufficient to support a finding a jurisdiction. *Atlantic Veal & Lamb,*

Inc. v. Silliker, Inc., 11 Misc. 3d 1072(A), 1072A (Sup. Ct. Kings Co. 2006) (loss profits by New York domiciliary “is not the type of direct injury contemplated by the statute”).

Because plaintiffs have failed to allege that they suffered an injury in New York under CPLR 302(a)(3) the Court does not address Issuer's other arguments in support of dismissal. For this same reason, plaintiffs' motion for jurisdictional discovery is denied as moot.

In accordance with the foregoing it is

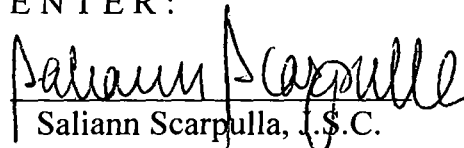
ORDERED that the motion by defendant Issuer Solutions, S.L. pursuant to CPLR 3211 (a) (7) and (8) and CPLR 327, for an order dismissing the complaint (motion sequence no. 001) is granted and the complaint is severed and dismissed as to this defendant; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motion by plaintiffs Acupay System LLC and Acupay S.L.U. pursuant to CPLR 3211 (d), for an order staying Issuer Solutions, S.L.'s motion pending completion of jurisdictional discovery (motion sequence no. 002) is denied as moot.

Dated: New York, New York
April 4, 2014.

ENTER :


Saliann Scarpulla, J.S.C.