

Gahtan v Ibrahim

2014 NY Slip Op 31004(U)

April 15, 2014

Supreme Court, New York County

Docket Number: 114459/11

Judge: Debra A. James

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identity" by one or more of the defendants.¹ More precisely, Gahtan alleges that Ibrahim and/or one of the other defendants contacted securities brokerage institutions in which Gahtan has accounts and impersonated Gahtan in order to gain access to his New York accounts.

In his complaint, Gahtan alleges that he resides in the Bahamas and that Ibrahim: (1) resides in California; (2) is employed by Wavsys, LLC (Wavsys), a telecommunications company that is headquartered in New York and regularly "does or solicits business, and/or derives substantial revenue from goods used or services rendered in New York"; (3) that she earns her salary from interstate and international commerce; (4) resided in New York in or around 1999 and again in or around 2006, for a period of six months or more each time; and (5) from approximately 2006 to 2008, Ibrahim worked in New York, as required by her immigration visa.

Gahtan further alleges that Ibrahim engaged in tortious conduct that caused "adverse consequences" in New York, and that she could have reasonably foreseen those consequences.

On March 14, 2012, Ibrahim moved to dismiss the complaint on the grounds that: (1) the court lacks personal jurisdiction over Ibrahim; (2) the summons and complaint served do not

¹ Prior to the filing of this lawsuit by Gahtan, Ibrahim filed a petition in the California Superior Court against Gahtan for child custody, visitation rights and child support.

indicate the filing date or index number as required under CPLR 305;² and (3) the summons and complaint were not properly served.³ Oral argument upon the motion was heard on June 26, 2012. On December 27, 2012, after learning that someone attempted to gain access to his E*Trade account, Gahtan filed an amended complaint that included additional facts about Ibrahim's domicile and an additional brokerage institution.

In his amended complaint, Gahtan alleges that from approximately 2006 to 2008, Ibrahim worked in New York for a New York based employer. Gahtan further alleges that "prior to and overlapping with her employment and/or engagement with Wavsys or an affiliate entity (which commenced on September 2008 or earlier), Defendant Ibrahim purported to be employed by Woodlands International LLC (a New York real estate brokerage firm owned by her former brother-in-law Adam Cohen) (Woodlands)". Gahtan claims that Ibrahim's employment with Woodlands was a "sham" created so that she could obtain her visa and stay in New York.

² Pursuant to CPLR 305 (a), the summons should "bear the index number assigned," however, pursuant to CPLR 305 (c), the court may allow amendments of the summons at any time, provided the "right of a party against whom the summons issued is not prejudiced." Such is the case here.

³ Ibrahim argues that service of the summons and complaint was not proper, because they were delivered to her sister. According to the affidavits of service, the pleading was served at Ibrahim's home on a person of suitable age and discretion and then mailed. The affidavits of service annexed to the affirmation of Weingart, as Exhibit D, reflect that service in this action was consistent with CPLR 313, which states in part: "[a] person domiciled in the state or subject to the jurisdiction of the courts of the state under section 301 or 302 ... may be served with the summons without the state, in the same manner as service is made within the state" Therefore, service was sufficiently made.

Gahtan further alleges that in February 2009, Wavsys entered into an agreement with Woodlands under which Wavsys was to receive recruiting services provided by Ibrahim, provided through her employment with Woodlands. Gahtan has annexed a copy of this agreement to the amended complaint. It is signed by a director at Wavsys, Joshua Mangerson, but not by Ibrahim.

In the amended complaint, Gahtan alleges that Ibrahim used a Wavsys New York office fax number as her business contact. He states that this is indicated on her business email correspondence of September 24, 2009 and December 10, 2009.

Gahtan additionally alleges that, although in one document a Wavsys executive states that Ibrahim began her employment with Wavsys in 2011, in a letter submitted to the United States Consulate in London, in support of her B1 business visa application, she states that she began her employment with Wavsys in its London office in 2009. Gahtan contrasts these statements with Ibrahim's statement in supporting affidavit, that she was working for Woodlands in 2009. Furthermore, according to the amended complaint, Ibrahim's visa application indicates that she was to participate in a six-month training process for Wavsys in its New York office. Finally, the amended complaint alleges that Ibrahim engaged in tortious conduct that caused damage in New York and, therefore, she was aware that her conduct could have consequences in New York.

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Specifically, the amended complaint alleges that Gahtan has an account at one of Fidelity's New York branches. He alleges that on November 24, 2011, and December 8, 2011, defendant(s) "telephoned" Fidelity and "attempted to access Plaintiff's account at Fidelity via Fidelity's automated telephone system". Likewise, Gahtan alleges that, on November 24, 2011, and on December 7, 2011, the defendant(s) "telephoned" Scottrade, which has offices in New York, to access Gahtan's account; and, finally, on November 17, 2011, defendant(s) "telephoned" E*Trade, which, "upon information and belief, is headquartered in New York," to attempt to access Gahtan's account.

There are five causes of action set forth in the amended complaint: (1) violation of New York General Obligation Law § 380-s--"one or more of the Defendants, knowingly and with the intent to defraud, attempted to obtain, possess, transfer or use, Plaintiff's brokerage accounts and the fund therein without Plaintiff's consent"; (2) intentional interference with prospective economic advantage--one or more of the defendants interfered with defendants' business relationships with Fidelity, Scottrade and E*Trade by attempting to gain access to plaintiff's accounts; (3) trespass to personal property/chattel--defendants intentionally interfered with plaintiff's possession of Gahtan's brokerage accounts; (4) conversion--defendants exercised dominion over plaintiff's accounts to the exclusion of plaintiff because

the accounts were frozen; (5) prima facie tort--defendants intentionally committed theft of plaintiff's identity and, therefore, plaintiff is entitled to special damages.

Ibrahim filed an amended motion to dismiss the amended complaint on the grounds that: (1) pursuant to CPLR 2214, the amended complaint should be dismissed as an improper sur-reply; and (2) in the event the court accepts the amended complaint, then Ibrahim asks the court to accept the original motion to dismiss as a motion to dismiss the amended complaint, including the arguments pursuant to CPLR 3211 (a) (8) based upon a lack of personal jurisdiction and, under CPLR 327, for inconvenient forum.

In an affidavit in support of the amended motion to dismiss, Ibrahim avers that she resides in California and is employed by Wavsys, a staffing and recruitment firm that is headquartered in New York, as the director of West Coast operations, and her office is in Los Angeles. She has been employed by Wavsys in California since March 1, 2011. She states that her salary is earned solely from her work within the state of California. Further, Ibrahim avers that she never resided in New York; her visits to her sister in New York ended more than three years ago; and she never stayed more than three months.

She states that from the end of 2006 until 2009, she lived in Miami continuously, and then she moved back to London. In

response to Gahtan's allegations concerning Woodlands, Ibrahim states that she worked for Woodlands in Miami when she lived in Miami. She states she never signed the agreement that Gahtan describes in paragraphs 7 and 8 of the amended complaint, and that it never had any effect.

According to Ibrahim, she applied to the United States for a business visa in August 2009, but the U.S. Embassy denied it. Instead, she had a an L1A visa. According to Ibrahim, she was not eligible for a BI visa, as that type of visa is for professional workers only, and the L1 visa did not restrict her employment to New York.

In an affidavit in support of the motion to dismiss, Sean Yazbeck, president of Wavsys, avers that Ibrahim entered the United States in 2011 to work for Wavsys in California; he denies the existence of a contract executed between Woodlands and Wavsys to use Ibrahim's services, although one might have been contemplated.

In an affidavit in support of the motion to dismiss, John Rafferty, chief financial officer of Wavsys, avers that Ibrahim is employed by Wavsys in the California office, the income derived for Wavsys by Ibrahim is solely from West Coast regional revenue and that her paycheck is administered by Paychex at its Florida location.

In response to the allegations that she uses a New York fax number as her business contact, Ibrahim states that the number "referenced by plaintiff is an electronic fax (efax) number used by corporations throughout the world to automate fax reception and distribution by email rather than paper. The area code of that number is irrelevant to the location where business is conducted".

On a motion to dismiss, the "court must accept as true the facts alleged in the complaint as well as all favorable inferences that may be gleaned from those facts" (Skillgames, LLC v Brody, 1 AD3d 247, 250 [1st Dept 2003]; see also Amaro v Gani Realty Corp., 60 AD3d 491, 492 [1st Dept 2009]). The court is not permitted "to assess the merits of the complaint or any of its factual allegations, but [may] only ... determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action" (Skillgames, LLC, 1 AD3d at 250), citing Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]).

"However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration" (Skillgames, LLC, 1 AD3d at 250, citing Caniglia v Chicago Tribune-N.Y. News Syndicate, 204 AD2d 233, 233-234 [1st Dept 1994]). Under 3211

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(a) (1), where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]).

Gahtan's amended complaint was properly and timely filed with the court. Pursuant to CPLR 3025 (a), "a party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it." As Ibrahim's motion to dismiss extended her time to answer the complaint, Gahtan's time for filing an amended complaint has not expired (see Nimkoff Rosenfeld & Schechter, LLP v O'Flaherty, 71 AD3d 533, 533 [1st Dept 2010] ["[p]laintiff had the right to amend its complaint during the pendency of defendants' motion to dismiss"]; Johnson v Spence, 286 AD2d 481, 483 [2d Dept 2001]).

This court will apply Ibrahim's motion to dismiss the original complaint to the amended complaint, as that is defendant's request (Ferguson v Sherman Sq. Realty Corp., 30 AD3d 288, 288 [1st Dept 2006]; Sage Realty Corp. v Proskauer Rose LLP, 251 AD2d 35, 38 [1st Dept 1998]).

Ibrahim moves to dismiss the amended complaint pursuant to CPLR 3211 (a) (8), which states: "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... the court has not jurisdiction of the person of the defendant"

Since Ibrahim is not a New York resident, and was not at the time of the alleged wrongdoing, she is not subject to personal jurisdiction in New York unless the allegations of Gahtan's complaint demonstrate that New York's long-arm statute confers jurisdiction over Ibrahim on the basis of her contacts within the state (Copp v Ramirez, 62 AD3d 23, 28 [1st Dept 2009]). "The burden rests on plaintiffs, as the parties asserting jurisdiction" (*id.*). "Such burden, however, does not entail making a prima facie showing of personal jurisdiction; rather plaintiff need only demonstrate that it made a 'sufficient start' to warrant further discovery" (Peterson v Spartan Indus, 33 NY2d 463, 467 [1974]).

A defendant in New York may be subject to long-arm jurisdiction pursuant to CPLR 302 (a) (1), (2) or (3), which provide:

"As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent: ...

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or

2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
 - (I) 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
 - (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce ... "

Gahtan has not meet his burden with respect to CPLR 302 (a)

(1). Under this section, a plaintiff make a "sufficient start": that a defendant both transacted business within the state, and that the cause of action arose from that transaction (Copp v Ramirez, 62 AD3d at 28). Here, Ibrahim has submitted sworn statements that establish that she does not live in New York and that she does not work in New York. Gahtan's submission does not contradict these facts. Ibrahim's submission shows that she works as a recruiter at Wavsys in California, that she is responsible for her company's business on the West Coast, that she does not work in New York or provide goods or services to New York, and that she receives a salary for her work from Wavsys. Additionally, there is no link between the allegations in the complaint and Ibrahim's work for Wavsys. As Gahtan has failed to "demonstrate the possible existence of essential jurisdiction facts that are not yet known (Copp, supra, 32), there are no

grounds to find that there is jurisdiction under CPLR 302 (a) (1).

Likewise, there is no jurisdiction pursuant to CPLR 302 (a) (2). Under this section, a plaintiff demonstrate the possible existence of essential jurisdictional facts that establish that a defendant engaged in tortious conduct "within" New York (*id.*). This section of the statute has been narrowly construed to apply only when the defendant's wrongful conduct is performed in New York (Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 302:10). The Court of Appeals held in Longines-Wittnauer Watch Co. v Barnes & Reinecke, (15 NY2d 443, 458-464 460 [1965] [concerning Feathers v McLucas]) that in order for jurisdiction to lie under this statute, the defendant must have committed the subject act within the state:

"The language of paragraph 2--conferring personal jurisdiction over a nondomiciliary 'if, in person or through an agent, he ... commits a tortious act *within* the state'--is too plain and precise to permit it to be read, as has the Appellate Division, as if it were synonymous with 'commits a tortious act *without* the state which causes injury within the state'"

(*id.* at 460).

The Court of Appeals drives home its point further in the decision:

"[a]ny possible doubt on this score is dispelled by the fact that the draftsmen of section 302 pointedly announced that their purpose was to confer on the court 'personal jurisdiction over a non-domiciliary whose act *in the state* gives rise to a cause of action' or, stated somewhat differently, 'to subject non-residents

to personal jurisdiction when they commit acts within the state'"

(*id.*).

This reasoning has been applied in subsequent cases (Kramer v Vogl, 17 NY2d 27, 31 [1966] [the Court insisted that the defendant's conduct must occur within the state in order to confer jurisdiction over him]; Sino Clean Energy Inc. v Little, 35 Misc 3d 1226(A), *10, 2012 NY Slip Op 50907(U) [Sup Ct, NY County 2012] ["to obtain jurisdiction under [302 (a) (2)], the defendant must be physically present within New York while committing the tort"]; Ganci v Cape Canaveral Tour & Travel, Inc., 2004 WL 5641697 [Sup Ct, NY County 2004], No. 18462/03 *affd* 21 AD3d 399 [2d Dept 2005] ["302 (a) (2) has been narrowly construed to require a defendant to be physically present in New York at the time of the tortious act"]).

Federal courts construing 302 (a) (2) have "uniformly held that jurisdiction under [this] section cannot be predicated upon telephone calls made or letters mailed into this state" (DirectTV Latin America, LLC v Park 610, LLC, 691 F Supp 2d 405, 425 [SD NY 2010] [quotes and citation omitted]). "A defendant's physical presence in New York is a prerequisite to jurisdiction" (*id.* at 424; see also Ahava Food Corp. v Donnelly, 2002 WL 31757449, *2-3, 2002 US Dist LEXIS 23731, *6-8 [SD NY, Dec. 9, 2002 No. 02 Civ. 4344 (RWS)] [where plaintiff alleged that defendant committed a tort by contacting customers in New York by telephone

or mail, court held that such communication from outside of New York into New York is not an act committed "within the state" for the purposes of § 302 (a) (2)].

Yet, "[s]ome courts have resisted the traditional view" (Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 302:10 at 194). The example provided is Banco Nacional Ultramarino v Chan (169 Misc 2d 182 [Sup Ct, NY County 1996], *affd* 240 AD2d 253 [1st Dept 1997]). In Banco Nacional Ultramarino, the defendant, a Nigerian company, maintained a New York City bank account. From overseas, the defendant directed the bank to transfer the monies in question in the lawsuit.

At the outset of its decision, the court noted that any analysis of personal jurisdiction under CPLR 302 (a) (2) requires an inquiry into whether the nonresident defendant has "minimum contacts with the forum State 'so that maintenance of the ... suit' does not offend notions of 'fair play and substantial justice'" (*id.* at 187 citing International Shoe Co. v State of Washington, Office of Unemployment Compensation & Placements, 326 US 310, 320 [1945]). In its ensuing discussion, the court relied upon the fact that it was defendant's New York bank account that was the "conduit through which the fraudulent scheme advanced for two years" (Banco Nacional, 169 Misc 2d at 187) that defendant elected to use a New York banking institution, that this afforded defendant the protection of New York's banking law

and access to "the extensive communications network available in this financial center," and that the "account is directly related to the causes of action asserted by plaintiff" (*id.*) and, thus, determined that sufficient contacts existed.

The Banco National Court ultimately found that the defendant need not have been physically present in the State during the commission of the tort in order for there to be personal jurisdiction. As there were allegations that the defendant committed an affirmative act in New York and because of the technological realities of modern banking, the Court found that the requirements of CPLR 302 (a) (2) had been satisfied (*id.* at 188).

Likewise, in Lawati v Montague Morgan Slade Ltd. (102 AD3d 427 [1st Dept 2013]), the First Department found that, even though the defendant was not physically present in New York during the commission of the alleged tort, there was still jurisdiction under CPLR 302 (a) (2). In Lawati, the complaint alleged that the defendants, through a "virtual office, predominantly existed in New York and committed the torts underpinning the conspiracy there" (*id.* at 429). The communication of one defendant, who was aware of the torts being committed by other defendants in New York, was under the direction of those defendants in the virtual office in New York. The Court found that all of the factors necessary to find a

conspiracy for the purposes of personal jurisdiction were satisfied and, thus, found that the minimum contacts were satisfied (*id.* at 429).

Thus, although the Court of Appeals has taken a strict approach to finding jurisdiction pursuant to CPLR § 302 (a) (2), in requiring the presence of the defendant in New York, the First Department has relaxed that standard to find that where the defendant has, for example, a bank account or a virtual office in New York, the defendant's physical presence is not a requirement for jurisdiction under the statute.

This court finds, under either standard, that Gahtan is unable to make a "sufficient start" in meeting his burden to show possible essential jurisdictional facts that establish personal jurisdiction over Ibrahim under Section 302 (a) (2). First, there is no showing that Ibrahim has any meaningful contacts to New York. The parties' submissions show that Ibrahim lives in California. She does not own real property in New York, nor does she have a bank account or an office here. Although her employer, Wavsys, is headquartered in New York, Ibrahim, her employer and Gahtan all aver that she works in California. Ibrahim does not perform any work in New York. She avers that she is the director of West Coast recruiting, for which she receives a salary, and that she travels on the West Coast for her work. She states that she only contacts the Wavsys New York

office seeking approval for out-of-state employment arrangements. Besides Gahtan's conclusory statements about Ibrahim's earning substantial income from goods and services in New York, Ibrahim's statements about her employment are uncontradicted. Gahtan's allegations concerning Ibrahim's visa applications and her work for Woodlands, do not suggest that Ibrahim had any presence in New York at the time of the alleged tort.

Furthermore, even when this court views the allegations in the amended complaint as true, which it must on this motion, there is no allegation in the complaint that Ibrahim made a telephone call specifically into the state of New York to commit the alleged tort or that Gahtan was injured in the state of New York. In his amended complaint, Gahtan alleges that one of the defendants made a telephone call to Fidelity, to Scottrade and to E*Trade, but does not allege that the defendant(s) made that call to the banks' offices in New York.

For example, Gahtan alleges that he has an account at one of Fidelity's New York branches and that one or more of the defendants "telephoned Fidelity and used Plaintiff's identity ... to access his Fidelity account in New York". Likewise, the allegations concerning defendant(s) contact with Scottrade state: "[p]laintiff opened an account at Scottrade. Upon information and belief, Scottrade has offices in New York... . Without Plaintiff's consent, one or more of the Defendants telephoned

Scottrade, identified themselves as Plaintiff's wife ... so that Defendants could access Plaintiff's Scottrade account". The allegations concerning the telephone calls to Scottrade and E*Trade likewise do not state that Ibrahim made a telephone call to New York that caused the injury. Furthermore, Gahtan alleges in the amended complaint that he resides in the Bahamas. As the subject banks have branches internationally, it is not established by Gahtan's allegations that the alleged injury took place in New York. It is, therefore, not established from Gahtan's pleading that Ibrahim reached into New York or should have anticipated any injury in New York.

Finally, Gahtan has not established a "sufficient start" that justify discovery as to jurisdiction under CPLR 302 (a) (3). Under this section, a plaintiff must allege that the defendant committed an out-of-State tort causing an in-State injury and does business in the State (Seevers v Tang, 268 AD2d 249, 249 (1st Dept 2000)). Again, Gahtan has offered no evidence that Ibrahim does business in New York. His allegation that Wavsys is headquartered in New York does not subject Ibrahim to jurisdiction here. Moreover, his allegations that she worked for Woodlands in New York in 2009 are not substantiated, and such employment would not coincide with the time frame when the subject tort was allegedly committed. He offers nothing more

than this conclusory statement that she worked in New York in 2009.

Moreover, Gahtan argues that because Wavsys is headquartered in New York, Ibrahim derived her income from New York. He supports this argument by citing Local 875 I.B.T. Pension Fund v Pollack (992 F Supp 545, 557 [ED NY 1998]). Yet, in that case, the court found that the individual defendant was a managing director of the defendant corporation and "hence, its agent for whose tortious conduct it may be held responsible" (*id.* at 557). The court found that the individual defendant was subject to personal jurisdiction in New York as he actively participated in international business transactions by writing letters, communicating with banks worldwide and transferring funds internationally (*id.* at 558-559).

Gahtan does not contend that Ibrahim individually derives income from New York. Gahtan has not offered anything that suggests that Ibrahim individually earns substantial income from international or interstate commerce or that she personally derives substantial income from goods or services in New York.

Ibrahim refutes plaintiff's assertion of jurisdiction by offering her own sworn statement, which details where she worked and when, and sworn statements from her employer, as well as her pay stubs. Ibrahim states:

"I work in and derive my income from California where I keep an office. I travel extensively between San

Diego, San Francisco and Los Angeles for my job. My employment entails arranging for W-2 employees of Wavsys, LLC to be contracted out to telecommunications companies like T-Mobile and AT&T when they need additional workers. In addition to traveling throughout the West Coast, I also make calls to Pennsylvania, Virginia, in Miami [sic] in order to work with different recruiters ... My only communications to the New York office are when I e-mail or call Human Resources department to request approvals for employment arrangements that are outside of New York".

Furthermore, Gahtan alleges that Ibrahim worked for Woodlands in 2009, which does not coincide with the commission of the tort in 2011.

Since the court finds that there is no personal jurisdiction over Ibrahim, it need not address the remaining arguments on this motion.

Accordingly, it is hereby

ORDERED that defendant Irene Ibrahim's motion to dismiss the amended complaint herein is granted and the amended complaint is dismissed in its entirety, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor of said defendant.

This is the decision and order of the court.

Dated: April 15, 2014

ENTER:

FILED

~~DEBRA A. JAMES~~
DEBRA A. JAMES J.S.C.

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