

Plum Group, Inc. v Beneflex HR Resources, Inc.

2014 NY Slip Op 32285(U)

August 25, 2014

Supreme Court, New York County

Docket Number: 650842/2014

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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THE PLUM GROUP, INC.

Plaintiff,

Index No.
650842/2014

Decision and
Order

- against -

Mot. Seq. 001

BENEFLEX HR RESOURCES, INC.,

Defendant.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Plum Group, Inc. ("Plaintiff") brings an action for breach of contract and unjust enrichment based on a written Subscriber Services Agreement (the "Contract") to provide software and telephone services to defendant Beneflex HR Resources, Inc. ("Defendant" or "Beneflex").

Defendant interposed an answer on May 19, 2014, asserting various affirmative defenses, including lack of jurisdiction. Defendant now moves for an Order, pursuant to CPLR § 3211(a)(8), dismissing Plaintiff's complaint for lack of personal jurisdiction. In support, Defendant submits the affidavit of James Schmersahl ("Schmersahl"), the owner of Beneflex.

Plaintiff opposes.

CPLR § 3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(8) the court has not jurisdiction over the person of the defendant;

CPLR § 302 permits a court to exercise personal jurisdiction over a non-domiciliary who, in person or through an agent, transacts any business within the State, provided that the cause of action arises out of the transaction of business. (CPLR § 302 [a][1]; *Lebel v. Tello*, 272 A.D.2d 103, 103-04 [1st Dep't 2000]). CPLR § 302(a)(1) is a “single act statute” and “proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, as long as the requisite purposeful activities and the connection between the activities and the transaction are shown.” (*Deutsche Bank Sec., Inc. v. Montana Bd. of Invs.*, 21 A.D.3d 90, 93-94 [1st Dep't 2005]). For purposes of CPLR § 302(a)(1), “[p]urposeful activities are those with which a defendant, through volitional acts, ‘avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.’” (*Fischbarg v. Doucet*, 9 N.Y.3d 375, 380 [2007]). Alternatively, cumulative minor activities may provide sufficient grounds for “transaction of business” jurisdiction, so long as the cumulative effect creates a significant presence in the State. (*O'Brien v. Hackensack Univ. Med. Ctr.*, 305 A.D.2d 199, 200 [1st Dep't 2003]; CPLR § 302 [a][1]). The “test is whether the defendant has engaged in some purposeful activity in New York in connection with the matter in controversy.” (*Otterbourg, Steindler, Houston & Rosen, P.C. v Shreve City Apartments*, 147 A.D.2d 327, 331 [1st Dep't 1989]). In either event, the burden of proving jurisdiction rests on the party asserting it. (*O'Brien*, 305 A.D.2d at 200).

The Due Process Clause of the Fourteenth Amendment also constrains a State’s authority to bind a nonresident defendant to a judgment of its courts. To this end, the nonresident generally must have “certain minimum contacts . . . such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” (*International Shoe Co. v. Washington*, 326 U. S. 310, 316, [1945]). In order for New York to exercise specific jurisdiction consistent due process, therefore, the defendant’s “suit-related conduct” must create a “substantial connection” with New York, the forum State. (*Walden v. Fiore*, 134 S. Ct. 1115, 1121 [2014]). This connection must arise from contacts that the “defendant *himself*” creates with New York. (*Id.* at 1122, quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 [1985]). Moreover, the “minimum contacts” analysis looks to the defendant’s contacts with the forum state itself, not the defendant’s contacts with persons who reside there. (*Walden*, 132 S. Ct., at 1122).

Defendant argues that Plaintiff’s sole purported basis for jurisdiction is a choice of law provision contained in the Contract (the “Choice of Law Provision”), which establishes New York as the governing law for any and all disputes arising from the Contract. Defendant argues that Beneflex is a non-domiciliary who did not transact business in New York, and that the Contract, including the Choice of Law

Provision, is insufficient, without more, to establish jurisdiction. Defendant argues that the Contract does not contain a forum selection or choice of venue clause, and that choosing New York law is not tantamount to granting New York jurisdiction. Defendant further argues that it does not have sufficient “minimum contacts” with New York to create jurisdiction consistent with due process. In the affidavit of Schmersahl, Schmersahl avers that Defendant is a Missouri corporation with its principal place of business located in Missouri. Schmersahl avers that Defendant has no offices or employees in New York, and has no regular or systematic contacts with New York. Schmersahl further avers that the Contract was negotiated via telephone and email between Beneflex, in St. Louis, Missouri, and Plaintiff’s representative in Colorado, and that the Contract, by its terms, concerns services to be provided to Defendant in St. Louis, Missouri.

Plaintiff’s complaint alleges that Plaintiff is a Delaware corporation with its principal place of business in New York, and that Defendant is a Missouri corporation with its principal place of business in Missouri. Plaintiff’s complaint asserts jurisdiction based on the Contract’s Choice of Law Provision, “establishing New York as the governing law for any and all disputes arising under the Contract.” The Contract is annexed to Plaintiff’s complaint. Plaintiff argues that New York has jurisdiction because Defendant executed a Contract containing a New York Choice of Law Provision, and because New York is the proper forum in which to litigate disputes involving New York law. Plaintiff also argues that Defendant is subject to New York jurisdiction because New York is the most convenient forum for Plaintiff, a New York resident, to bring this suit.

Here, it is undisputed that Defendant is foreign corporation that is not registered to do business in New York. It is also undisputed that, although the Contract contains a Choice of Law Provision designating New York law as the governing law for the instant dispute, the Contract does not contain a separate choice of forum or choice of venue provision. Plaintiff does not dispute Defendant’s contentions that the Contract was negotiated elsewhere, or that the Contract governs services to be provided outside the forum state. As Plaintiff does not show, or even suggest, that Defendant engaged in purposeful activities in New York in connection with the instant controversy, Defendant’s consent to New York law does not, without more, satisfy the requirements of CPLR § 302(a)(1)¹.

¹ To the extent that Plaintiff also asserts jurisdiction under CPLR § 302(a)(3)(ii), this statute permits a court to exercise personal jurisdiction over a non-domiciliary who “commits a tortious act without the state causing injury to person or property within the state . . . [if he] expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.” However, as Plaintiff’s complaint does not allege a tortious act, CPLR § 302(a)(3)(ii) is not a proper basis for jurisdiction.

Furthermore, Plaintiff does not demonstrate “minimum contacts” sufficient to create specific—let alone general—jurisdiction consistent with due process. Defendant’s act of executing a Contract with a New York resident, for services to be provided in Missouri, does not, without more, create the necessary connection between Defendant and the forum State. (*see Burger King, supra*, 471 U.S. at 478 [“If the question is whether an individual’s contract with an out-of-state party alone can automatically establish sufficient minimum contacts in the other party’s home forum, we believe the answer clearly is that it cannot”]). Likewise, Plaintiff’s argument that New York has jurisdiction because New York is the most convenient forum for this litigation is unpersuasive. “[D]ue process limits on the State’s adjudicative authority principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties.” (*Walden*, 134 S. Ct., at 1122 [2014]).

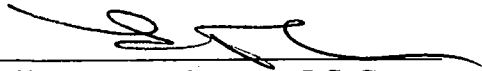
Wherefore it is hereby,

ORDERED that Defendant Beneflex HR Resources, Inc.’s motion to dismiss for lack of jurisdiction is granted; and it is further

ORDERED that Plaintiff the Plum Group, Inc.’s complaint is dismissed in its entirety and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court. All other relief requested is denied.

Dated: August 25, 2014


Eileen A. Rakower, J.S.C.