Gottlieb Rackman & Reisman, P.C. v Luminary Logic Ltd.
2014 NY Slip Op 32982(U)
November 21, 2014
Supreme Court, New York County
Docket Number: 154910/2014
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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GOTTLIEB RACKMAN & REISMAN, P.C.

Plaintiff,

Index No.
154910/2014

Decision and
Order

- against -

Mot. Seq. 001

LUMINARY LOGIC LIMITED
a/k/a LUMINARY LOGIC LTD.
and MARK WAGNER,

Defendants.

--X

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

Plaintiff Gottlieb Rackman & Reisman, P.C. ("Plaintiff") brings this action for unpaid legal fees for services allegedly rendered to entity defendant Luminary Logic Limited a/k/a Luminary Logic Ltd. ("Luminary") and it's alleged "alter ego", individual defendant Mark Wagner ("Wagner") (and together with Luminary, collectively, "Defendants"). Plaintiff claims that, on or about June 13, 2001, Defendants retained Plaintiff to render legal services for Defendants pursuant to a retainer agreement (the "Retainer Agreement").

Luminary interposed an answer on August 20, 2014, asserting various affirmative defenses. Luminary's answer does not assert lack of personal jurisdiction as an affirmative defense.

Wagner now moves for an Order, pursuant to CPLR § 3211(a)(8), dismissing Plaintiff's complaint as against Wagner for lack of personal jurisdiction. In support, Wagner submits the affidavit of Wagner, dated August 12, 2014; and the attorney affirmation of Aaron A. Mitchell ("Mitchell"), dated August 20, 2014.

Plaintiff opposes. In support, Plaintiff submits the attorney affirmation of Eric Schutzer, Esq.; and, a copy of a letter, dated April 2010, addressed to Schutzer from

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Wagner, purporting to enclose a check for $6,000.00 to be applied to Luminary's debt to Plaintiff (the "April 2010 Letter"); and, a copy of Luminary's check, dated April 16, 2010, in the amount of $6,000.00 payable to Plaintiff's attorney.

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 with 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).

Wagner argues that Plaintiff fails to allege, let alone prove, a proper basis for this Court's exercise of personal jurisdiction over Wagner. Wagner argues that Wagner is an individual domiciled in the state of Maryland, and that Wagner did not transact business with Plaintiff. Wagner avers that he has no agreement of any kind with Plaintiff, and that Wagner "recently purchased a portion of the business entity identified in the instant action as Defendant [Luminary]". Wagner further avers that, "It is my understanding that Plaintiff alleges that there was some form of business relationship between Plaintiff and Luminary; any such relationship, if it does, in fact, exist, was not a relationship formed and/or furthered by [Wagner] as an individual." In addition, Wagner argues that the fact that Luminary has submitted to the jurisdiction of the New York Courts does not mean that Wagner has done the same.

Plaintiff's complaint alleges that Luminary is a Maryland corporation, and that Wagner's place of business is located in Maryland. Plaintiff's complaint alleges that Wagner is the "sole and/or controlling owner of Luminary" and that Wagner dominated Luminary at all times relevant to this litigation. Plaintiff's complaint alleges that, "On or about June 13, 2001, Defendants retained Plaintiff to render legal services for Defendants pursuant to a written Retainer Agreement which set forth the legal fee arrangement between Plaintiff and Defendants . . . All the services rendered by Plaintiff took place in the City of New York and the retainer was executed in New York County." Plaintiff's complaint alleges that Plaintiff performed said services for Defendants between June 13, 2001 and December 16, 2010. Plaintiff's complaint asserts, "On or about April 14, 2010, in response to a demand for payment of the then outstanding sum of $84,155.73, Defendants reaffirmed the debt and made a partial payment of $6,000.00 and promised to pay the remaining balance when able."

Plaintiff argues that this Court has jurisdiction over Wagner because Plaintiff's complaint seeks to pierce the corporate veil to hold Wagner liable for Luminary's alleged obligations under the purported Retainer Agreement[1]. Plaintiff

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[1] Neither party submits a copy of the Retainer Agreement. Nor is the Retainer Agreement annexed to Plaintiff's complaint.

also argues that this Court may properly exercise personal jurisdiction over Wagner because Wagner interacted with Plaintiff on Luminary's behalf. To this end, Schutzer affirms that, "On September 29, 2009, [Schutzer] sent a demand to Luminary Logic and Wagner personally, demanding payment of Plaintiff's outstanding balance" and that, "Wagner responded to [Schutzer's] demands and communicated with both Plaintiff and Schutzer that he intended on resolving the outstanding balance and he wanted Plaintiff to perform additional services." Schutzer further affirms that, "Wagner was the only person to contact my office on behalf of Luminary Logic during this time", and that, "On or about April 14, 2010, Wagner sent [Schutzer's] firm a letter on his personal letterhead, reaffirming the debt owed to Plaintiff and promising payment thereof."

Here, Plaintiff fails to show that Wagner individually engaged in purposeful activity in New York in connection with the instant controversy, for purposes of CPLR § 302(a)(1). Plaintiff does not appear to dispute that Wagner is a foreign domiciliary. As "interstate negotiations by telephone, facsimile, or mail are insufficient to impose personal jurisdiction in New York on a non-resident defendant," neither the April 2010 Letter nor the affirmation of Plaintiff's attorney is sufficient to impose personal jurisdiction over Wagner. (*Professional Personnel Mgmt. Corp. v. Southwest Medical Assocs.*, 216 A.D.2d 958, 958 [4th Dep't 1995]). Similarly, even accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, Plaintiff's allegation that Wagner is Luminary's "controlling shareholder" is insufficient, without more, to subject Wagner, as an individual, to personal jurisdiction under the long arm statute. (*Ferrante Equipment Co. v. Lasker-Goldman Corp.*, 26 N.Y.2d 280, 283 [1970]).

Furthermore, in order to pierce the corporate veil to find personal jurisdiction over Wagner, Plaintiff must make a sufficient showing that Wagner exercised complete domination over Luminary with respect to transactions attacked, and that such domination was used to commit a fraud or wrong against Plaintiff, which resulted in Plaintiff's injury. (*Holme v. Global Mins. & Metals Corp.*, 22 Misc. 3d 1123(A), 1123A [Sup. Ct. N.Y. Cnty. 2009] *aff'd*, *Holme v. Global Mins. & Metals Corp.*, 63 A.D.3d 417 [1st Dep't 2009]). Here, even accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, Plaintiff's conclusory allegations of Wagner's domination and control over Luminary are insufficient to justify piercing the corporate veil to find personal jurisdiction. Insofar as the April 2010 Letter does not demonstrate that Wagner was even involved with Luminary at the time of the Retainer Agreement, or at any other time during the course of Plaintiff's alleged legal representation of Luminary, Plaintiff fails to demonstrate that facts may exist to establish personal jurisdiction over Wagner.

Accordingly, Plaintiff does not demonstrate a "sufficient start" to proving that this basis for personal jurisdiction is "not frivolous". (*Peterson v. Spartan Industries, Inc.*, 33 N.Y.2d 463, 467 [N.Y. 1974]).

Finally, the fact that Luminary appears to have submitted to the jurisdiction of the New York courts does mean that its shareholder has done the same. (*SNS Bank, N.V. v. Citibank*, N.A., 7 A.D.3d 352, 354 [1st Dep't 2004]).

Wherefore it is hereby,

ORDERED that defendant Mark Wagner's motion dismiss Plaintiff's complaint as against individual defendant Mark Wagner for lack of jurisdiction is granted; and it is further

ORDERED that the complaint of Plaintiff Gottlieb Rackman & Reisman, P.C. is dismissed as against individual defendant Mark Wagner 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: November 21, 2014

Eileen A. Rakower, J.S.C.