

**Jacobs v 201 Stephenson Corp.**

2014 NY Slip Op 33733(U)

October 16, 2014

Supreme Court, Nassau County

Docket Number: 600094/14

Judge: Stephen A. Bucaria

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

**ORIGINAL**

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

\_\_\_\_\_  
SHOLOM JACOBS and 326 COY BURGESS  
ROAD LLC,

TRIAL/IAS, PART 1  
NASSAU COUNTY

Plaintiffs,

INDEX No. 600094/14

MOTION DATE: Sept. 12, 2014  
Motion Sequence # 002

-against-

201 STEPHENSON CORPORATION, 201  
STEPHENSON LLC, MICHAEL P. LUBY,  
JAMES D. LUBY, WILDWOOD GREEN, INC.,  
DOUGLAS P. MCMANAMY and MCMANAMY  
JACKSON PC,

Defendants.

\_\_\_\_\_  
The following papers read on this motion:

- Notice of Motion..... X
- Affirmation in Support..... X
- Memorandum of Law..... XX
- Reply Memorandum of Law..... X

Motion by defendants Douglas McManamy and McManamy Jackson PC for leave to reargue their motion to dismiss the complaint for lack of personal jurisdiction is **granted**. Upon reargument, defendants' motion to dismiss the complaint for lack of personal jurisdiction is **granted**.

**JACOBS, et al****Index no. 600094/14**

This is an action for fraud and legal malpractice. Plaintiff Shalom Jacobs is engaged in the business of real estate acquisition and short term financing throughout the United States.

On December 21, 2012, Jacobs lent \$2.3 million to defendant Michael Luby, in order for Michael and his brother, defendant James Luby, to purchase a hotel in Savannah, Georgia. Title was taken through the names of defendants 201 Stephenson Corporation and 201 Stephenson LLC. On the same day, Jacobs entered into a management agreement with Michael and James Luby and the 201 Stephenson companies. As compensation for Jacobs' managing the hotel, defendants promised to pay Jacobs 10 % of the hotel's monthly net operating income, subject to a minimum of \$5,000 per month. Additionally, the owners were to pay Jacobs 10 % of the net proceeds of any refinancing, i.e. proceeds not used to pay off the existing debt or refurbish the hotel. In the management agreement, the owners consented to exclusive jurisdiction in Supreme Court, Nassau County, or the U.S. District Court for the Eastern District of New York for the resolution of disputes arising from the agreement. It appears that Michael and James Luby executed the management agreement in Georgia, and Jacobs executed the management agreement in Nassau.

Shalom Jacobs and Michael Luby formed a Delaware limited liability company, plaintiff 326 Coy Burgess Road LLC, which maintains its office in Lawrence. The purpose of 326 Coy Burgess Road is to make real estate loans to hotel operators. Michael Luby holds a 50 % interest in 326 Coy Burgess Road, and Jacobs holds a 42 % interest. Jacobs' attorney, Alexander Novak, owns an 18 % interest.

On February 21, 2013, Jacobs, Michael Luby, and Novak, entered into an operating agreement covering 326 Coy Burgess Road, LLC. The operating agreement shows 326 Coy Burgess' address as 141 Washington Avenue, Lawrence, New York. The operating agreement provides that Jacobs is the manager of the company. Among other powers, the manager may make expenditures for legal expenses incurred in connection with the operation of the company.

The operating agreement defines "cash flow" as all cash funds derived from operations of the company, including the sale of capital assets. The agreement provides that the first \$200,000 of cash flow is to be distributed 85 % to Jacobs and 15 % to Novak. The next \$800,000 of cash flow, up to \$ 1million, is to be distributed 50 % to Luby, 42.5 % to Jacobs, and 7.5 % to Novak. Cash flow over \$ 1 million is to be distributed 60 % to Luby, 37.5 % to Jacobs, and 2.5 % to Novak. It appears that Luby executed the operating agreement in Georgia, but Jacobs and Novak executed the agreement in Nassau.

Defendant Douglas McManamy is an attorney who practices in Georgia and is a member of McManamy Jackson PC. On February 22, 2013, the day after the operating agreement was executed, McManamy represented 326 Coy Burgess Road in connection with its purchase of the Defuniak hotel in Florida. Plaintiffs allege that on November 18, 2013, Michael Luby fraudulently transferred the Defuniak hotel to an entity known as the Defuniak Hotel Group LLC. Defendant Wildwood Green, Inc. was the owner of a hotel in Tallahassee, Florida. Plaintiffs allege that, on February 28, 2013, McManamy falsely represented that, if Jacobs bought the shares of Wildwood for \$1.8 million, there was \$2 million financing in place for Michael and James Luby to buy out Jacobs' interest. Plaintiffs allege that, in reliance upon this representation, Jacobs wired the \$1.8 million to a law firm in Tallahassee, Florida and purchased the stock of Wildwood for that price on March 1, 2013. Jacobs claims that he gave Michael and James Luby an option to buy the Wildwood shares for \$1.9 million. Jacobs alleges that McManamy represented him in connection with the Wildwood transaction. Finally, Jacobs alleges that Michael Luby eventually bought the Wildwood stock for only \$1.7 million, after getting a loan commitment shortly after June 28, 2013.

This action was commenced on January 8, 2014. On April 30, 2014, plaintiffs filed their first amended complaint. The first cause of action is against Michael Luby for fraudulent conveyance of the Defuniak Hotel, conversion of 326 Coy Burgess' assets, and breach of 326 Coy Burgess' operating agreement. Plaintiffs allege that the operating agreement required Luby to pay Jacobs a minimum of \$1.8 million upon the sale of the Defuniak hotel. Plaintiffs allege that Luby breached the operating agreement by failing to pay Jacobs his share of the cash flow upon transferring the hotel to the Defuniak Hotel Group.

The second cause of action is against McManamy for legal malpractice. Plaintiffs allege that McManamy failed to register 326 Coy Burgess Road in Florida as an out-of-state limited liability company and to list Jacobs as its managing agent. Plaintiffs further allege that McManamy should have included 326 Coy Burgess' Lawrence, NY address in the deed to the Defuniak hotel which the company received on February 22, 2013. Plaintiffs allege that Michael Luby would not have been able to fraudulently transfer the Defuniak hotel, if 326 Coy Burgess Road had been properly registered, and the New York address included in the deed.

The third cause of action is against defendants Michael Luby, James Luby, and McManamy for fraud in connection with the Wildwood hotel deal. Jacobs alleges that he bought the Wildwood stock in reliance upon McManamy's false representation that financing was in place for Michael and James Luby to buy out Jacobs' interest.

The fourth cause of action is for breach of the management agreement. It is asserted against defendants Michael and James Luby, the 201 Stephenson companies, and Wildwood.

By order dated June 23, 2014, defendants Douglas McManamy and McManamy Jackson PC's motion to dismiss the amended complaint for lack of personal jurisdiction was denied. Defendants had elected to apply their motion to dismiss to the amended complaint, even though the motion was originally addressed to the initial pleading.

The court reasoned that McManamy represented Jacobs in connection with two Florida real estate transactions. The communications between Jacobs and McManamy were of sufficient quality to establish an on-going attorney-client relationship in this jurisdiction. Because the fraud and malpractice claims were substantially related to the attorney-client relationship, defendants transacted business in this state and were subject to personal jurisdiction as to those claims.

Defendants Douglas McManamy and McManamy Jackson PC move for leave to reargue their motion to dismiss the complaint for lack of personal jurisdiction. Defendants argue that Douglas McManamy's phone calls to Jacobs in New York were insufficient to establish purposeful activity in New York and did not satisfy the requirement of "minimum contacts" with this state. In opposition, plaintiffs argue that McManamy made numerous phone calls to Jacobs concerning the hotel deals and that he was 326 Coy Burgess' attorney.

CPLR § 302(a)(1) provides that a defendant who transacts business in New York is subject to personal jurisdiction as to a cause of action arising from the transaction of business. Defendant will have transacted business in New York if he engages in "purposeful activity" in New York by availing himself of the privilege of conducting activities in this state, thus invoking the benefits and protections of its laws (*Deutsche Bank v Bd of Investors*, 7 NY3d 65, 71 [2006]). An out-of-state client, who purposefully attempts to establish an attorney-client relationship with a New York attorney, via telephone calls, faxes, and emails, has transacted business in New York (*Fischbarg v Doucet*, 9 NY3d 375, 380 [2007]). Thus, the client is subject to personal jurisdiction as to causes of action arising from the attorney-client relationship. Because the attorney-client relationship is located here, the "quality of defendants' New York contacts" establishes a transaction of business in this state.

In the present case, an out-of-state attorney communicated with plaintiff Jacobs concerning a series of out-of-state real estate transactions. The court must examine those communications to determine whether their purpose was to establish an attorney-client relationship with Jacobs.

In October 2012, Jacobs began exchanging emails and telephone calls with Michael Luby regarding potential hotel deals in various states. Luby described McManamy as his "go to lawyer," who would organize and coordinate all of their real estate transactions.

On December 19, 2012, Jacobs' attorney, Alexander Novak, emailed McManamy, inquiring whether Michael Luby was the same man who was involved with Harold Tully, a

lawyer who had recently been arrested. McManamy replied that Luby was the same man, but the charges against him had been dismissed. McManamy stated that he had shared the same concerns about Luby but his mind had been put “at ease” by Luby’s Virginia lawyer, Robert Rousseaus. McManamy also stated that Novak should speak to Luby directly about the matter with Tully. Jacobs then began speaking on the telephone with both Luby and McManamy as to how the Wildwood deal should be structured. Jacobs decided not to participate in the Wildwood deal at that time. However, shortly prior to the Savannah deal on December 21, 2012, Jacobs requested that McManamy provide him with Luby’s tax returns and financial information. Jacobs alleges that on February 28, 2013, McManamy telephoned Jacobs and told him that Michael and James Luby had a commitment from a lender to loan \$2.2 million on the Wildwood property. Jacobs alleges that McManamy stated that the bank would not be ready to lend the money for a week or two, and the Lubys needed to close the next day. Jacobs alleges that he agreed to purchase the stock of Wildwood for \$1.8 million upon McManamy’s representation that the financing was available for the Lubys to buy out his interest.

It is clear, from his initial email in December 2012, that McManamy’s purpose was to promote Jacob’s confidence in Michael Luby, rather than to create an attorney-client relationship with Jacobs. When a lawyer represents an organization, it is the organization which is the client, not the organization’s members or shareholders (Prof Conduct Rule 1.13). Thus, to the extent that McManamy had an attorney-client relationship with 326 Coy Burgess, he could not have had an attorney-client relationship with Jacobs. Moreover, because McManamy was licensed to practice law in Georgia, and subject to discipline in that state, Georgia would be the locus of any attorney-client relationship. Because McManamy’s communications with Jacobs did not have the purpose of establishing an attorney-client relationship in New York, McManamy did not transact business here so as to be subject to personal jurisdiction on a malpractice claim.

Where a defendant knowingly sends a false statement into a state intending it to be relied upon, for jurisdictional purposes, the defendant acts outside the state (*Palace Exploration Co. v Petroleum Dev. Co.*, 41 F. Supp.2d 427 [SDNY 1998]). An injury resulting from an out-of-state tort does not have its situs in New York merely by virtue of the fact that the injured party resides here and suffers pecuniary loss (Id). The situs of the injury is not the location in which plaintiff suffers financial loss, but where the critical events associated with the dispute take place (Id).

McManamy’s alleged misrepresentations occurred in Georgia, not New York. The critical events associated with the Wildwood deal took place either in Tallahassee, where the stock purchase agreement closed, or in Georgia where McManamy made the alleged misrepresentation. Because the situs of the injury is not New York, McManamy did not transact business here so as to be subject to personal jurisdiction on a fraud claim.

**JACOBS, et al**

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Accordingly, leave to reargue defendants' Douglas McManamy and McManamy Jackson PC's motion to dismiss the complaint for lack of personal jurisdiction is **granted**. Upon reargument, these defendants' motion to dismiss the second and third causes of action for lack of personal jurisdiction is **granted**.

So ordered.

Dated OCT 16 2014

  
J.S.C.

**ENTERED**

OCT 20 2014

NASSAU COUNTY  
COUNTY CLERK'S OFFICE