SHIRLEY WERNER KORNREICH
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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THE NAVITAS GROUP, INC.,

Index No.: 651965/2012

Plaintiff,

DECISION & ORDER

-against-

CERMED CORPORATION, INC., CERMED INTERNATIONAL, INC., CERMED DELAWARE, PETER GOMBRICH, ERIC GOMBRICH, KEN HOLBROOK, JIMMY LEE, IRENE PODOLAK, MARY RUBERRY and BLAINE RIEKE,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 002 and 003 are consolidated for disposition.

Defendants CerMed Corporation, Inc. (CerMed), CerMed International, Inc. (CerMed International), CerMed Delaware, Peter Gombrich, Eric Gombrich, Ken Holbrook, Jimmy Lee, Irene Podolak, Mary Ruberry, and Blaine Rieke moved, pursuant to CPLR 3211, to dismiss the Second Amended Complaint (the SAC). Seq. 002. Plaintiff, The Navitas Group, Inc. (Navitas), opposed the motion to dismiss, and the court reserved judgment on the motion after oral argument. *See* Dkt. 67 (9/18/14 Tr.). Subsequently, defendants moved for leave to supplement the record on the motion to dismiss. Seq. 003. Plaintiff opposed. Defendants' motions are granted in part and denied in part for the reasons that follow.

I. Procedural History & Factual Background

Navitas originally commenced this action on June 6, 2012. Navitas filed a first amended complaint (the FAC) on August 9, 2012. *See* Dkt. 2. On January 24, 2013, defendants moved to dismiss the FAC for lack of personal jurisdiction. In an order dated October 31, 2013 (the FAC Decision), the court granted the motion and dismissed the FAC without prejudice. *See* Dkt. 19.

The FAC Decision sets forth Navitas' allegations:

> [Navitas], a New York corporation, is a boutique business engaged in "establishing financial investment vehicles for startup entities". [CerMed] is a medical device company incorporated in Delaware and doing business in New York. In or around February 2011, [CerMed] reached out to Navitas and the parties negotiated and entered into a number of written agreements ... The agreements provided that [Navitas] would facilitate the listing of [CerMed] on the public exchange in Frankfurt, Germany by acquiring a public shell company into which [CerMed] could then merge; in exchange, [Navitas] would receive a monthly consulting fee, reimbursement of expenses, and retain a 15% equity interest in the company after the merger. Pursuant to plan, [Navitas] paid approximately $350,000 to acquire a public shell corporation named SM Prime Holdings, Co. Ltd. (SM Prime), becoming its sole shareholder. CerMed then merged into SM Prime, changed the shell's name to [CerMed International], and was listed on the Frankfurt exchange after a public offering in Germany. During this process, [Navitas] incurred approximately $75,000 in legal fees.
>
> After the listing CerMed engaged in a "reverse stock split," which, according to the complaint, had the effect of "greatly diluting" [Navitas'] interest. Moreover, in June 2011, CerMed informed [Navitas] that it intended to "cancel" [Navitas'] shares in CerMed International. Some months later, [Navitas] demanded that defendants reimburse it for the cost of acquiring SM Prime. Defendants did not respond. The [FAC] seeks a money judgment of at least $4,705,000 against CerMed, its related entities and its directors (named herein as individual defendants), asserting causes of action for fraud, conversion, unjust enrichment and breach of fiduciary duty. It also seeks a judgment declaring the validity of [Navitas'] CerMed International shares.

FAC Decision at 1-3 (citations omitted).

As discussed in the FAC Decision, the alleged bases for jurisdiction – CPLR 302(a)(2) & (3) – are only applicable to causes of action sounding in tort, not contract. *See id.* at 4. The court explained:

> To the extent that allegations giving rise to a cause of action for fraud can actually be discerned in the [FAC] (itself a worrisomely difficult task) it appears that [Navitas] is alleging that it was misled as to "the equity interests to be provided to [it] in [CerMed] and the expenses which [CerMed] was to pay to [Navitas]". But [Navitas] has already alleged that the expense reimbursement and the promised equity interest was part of the "various written agreements" it had reached with defendant. It would appear, then, that [Navitas'] (extremely sparse) fraud allegations merely amount to a claim that defendants did not abide by their

> contract with [Navitas].[1] This is insufficient to sustain a fraud claim. As a result, the allegation that defendants failed to uphold their promises regarding [Navitas'] equity interests and expense reimbursements does not sound in tort at all, and jurisdiction cannot be asserted with respect to these allegations under CPLR 302(a)(2) or (3).

Id. at 5-6 (citations omitted).

The court then analyzed whether jurisdiction existed over the remaining claims for breach of fiduciary duty and a declaratory judgment. *See id.* at 6. The court held it did not, nor did Navitas make a "sufficient start" warranting jurisdictional discovery. *See id.* at 6-7. The court, therefore, held that Navitas "failed to carry its burden of justifying this court's exercise of jurisdiction over the out-of-state defendants based on its alleged tort claims. Its sole argument, that jurisdiction is justified under CPLR 302(a)(2) or (3), fails, as the bulk of the complaint appears to actually allege breach of contract, which plaintiff has chosen to mischaracterize as a tort. Jurisdiction over these claims might be possible under CPLR 302(a)(1)." *Id.* Consequently, the court dismissed the FAC, but permitted Navitas to serve an SAC "to replead the second, third and fourth causes of action as breach of contract." *Id.* at 7.

Navitas filed the SAC on December 3, 2013. *See* Dkt. 23. The SAC is virtually identical to the FAC. Both pleadings state the basis for jurisdiction in paragraph 15. The SAC, however, contains less of a jurisdictional explanation than the FAC, as it merely states that "[j]urisdiction is proper pursuant to CPLR 302(a)(1)." Compare Dkt. 2 at 5, with Dkt. 23 at 3. Furthermore, rather than simply replead "the second, third and fourth causes of action [fraud, conversion, and unjust enrichment] as breach of contract", the FAC alleges three causes of action for breach of

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[1] Here, the court dropped a footnote stating that "[t]he complaint certainly does not describe with the requisite specificity any *other* statement by defendants which could serve as a basis for a fraud claim." *Id.* at 5 n.3

contract, specific performance, and a declaratory judgment. The breach of contract claim seeks three amounts allegedly due under the consulting contract: (1) Navitas' monthly fee of $15,000; (2) the $350,000 Navitas expended to create the shell corporation and effectuate CerMed's merger; and (3) the $75,000 Navitas incurred in legal fees in connection with the public listing in Germany. The specific performance claim seeks the 15% of equity in the new CerMed entity provided for in the share exchange agreement. Finally, the declaratory judgment claim seeks a ruling that the cancellation of Navitas' 2.75 million shares in CerMed International was invalid.

On January 2, 2014, defendants filed an answer containing boilerplate admissions and denials. *See* Dkt. 24. The answer asserts four affirmative defenses: failure to state a claim, unclean hands, statute of limitations, and failure to mitigate. *See id.* at 3. Five days later, on January 7, 2014, Navitas filed demands for depositions. On February 26, 2014, Navitas filed a request for a preliminary conference. *See* Dkt. 35. A preliminary conference was scheduled for May 22, 2014. That conference was adjourned after defendants filed the instant motion to dismiss on May 14, 2014.

II. Legal Standard

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). 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*, *id.*, citing

Guggenheimer v Ginzburg, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "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*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, 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) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

III. Discussion

The SAC's only alleged basis for asserting personal jurisdiction over defendants is CPLR 302(a)(1), which provides jurisdiction over a non-domiciliary that "transacts any business within the state or contracts anywhere to supply goods or services in the state." *See Johnson v Ward*, 4 NY3d 516, 519 (2005). 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**, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." *Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 (1988) (emphasis added);[1] *see Paterno v Laser Spine Institute*, 24 NY3d 370, 376 (2014) ("The lack of an in-state physical presence is not dispositive of the question whether

[1] Of course, to establish personal jurisdiction, a plaintiff must also demonstrate that defendants have the requisite minimum contacts with New York. *See generally Walden v Fiore*, 134 SCt 1115, 1122-23 (2014), accord *Burger King Corp. v Rudzewicz*, 471 US 462 (1985).

a non-domiciliary is transacting business in New York").

Before the court reaches the issue of whether CerMed is subject to personal jurisdiction in this court on Navitas' claim that it breached the consulting and share exchange agreements, the court dismisses the SAC against all of the other defendants, both on the grounds of lack of personal jurisdiction and failure to state a claim. It is well settled that breach of contract claims are ordinarily only allowed to be asserted against contractual counterparties. *Aetna Health Plans v Hanover Ins. Co.*, 116 AD3d 538 (1st Dept 2014); *see Leonard v Gateway II, LLC*, 68 AD3d 408 (1st Dept 2009) ("The court properly dismissed the breach of contract claims against all defendants except Gateway II, since plaintiff was not in privity with any of the other defendants"). Navitas admits that CerMed is the only defendant with whom it contracted. *See* SAC ¶¶ 17, 23 (alleging CerMed,[2] but not any other defendants, contracted with Navitas). Moreover, as CPLR 302(a)(1) is a specific (as opposed to general) jurisdiction statute, jurisdiction over non-contracting parties must arise from their involvement in the subject transaction. *See Pramer S.C.A. v Abaplus Int'l Corp.*, 76 AD3d 89, 95 (1st Dept 2010) ("Even if a defendant has engaged in purposeful acts in New York, there must also exist a substantial relationship between those particular acts and the transaction giving rise to the plaintiff's cause of action.").

Navitas does not allege that any of the non-contracting defendants availed themselves of the benefits of this State in connection with the contracts *in their individual capacity*, as opposed to as agents or employees of Navitas. Hence, there is no basis to assert jurisdiction against them individually. Furthermore, while Navitas seeks to subject the non-contracting defendants to

[2] CerMed International is the only exception, as it could be liable since, after the merger, CerMed allegedly became CerMed International. *See* SAC ¶ 24.

personal jurisdiction and liability under the contract by virtue of a "conspiracy" to breach the contact, such a conspiracy is conclusorily alleged. Merely alleging non-contracting parties were involved in a breach of contract is not a basis to evade the rule of privity. There are well settled exceptions to that rule, such as veil piercing [*see Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167 (1st Dept 2013)], but in all cases, a basis for extending contractual liability to non-parties must be supported by facts, not bald allegations of conspiracy. *See E. Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 16 NY3d 775 (2011) ("Since, by definition, a corporation acts through its officers and directors, to hold a shareholder/officer [] personally liable, a plaintiff must do more than merely allege that the individual engaged in improper acts or acted in 'bad faith' while representing the corporation."). Hence, where a corporate officer is the individual responsible for breach of a corporation's contractual obligations, if such breach was effectuated by the officer in his corporate capacity, that officer has no personal liability. *See id.* at 776. If that were not the case, the protections of the corporate form would be illusory.

Navitas, moreover, argues that defendants waived their defense of personal jurisdiction. CPLR 3211(e) provides that where a defendant neither raises the defense of personal jurisdiction in a pre-answer motion or in its answer, he has appeared in the case and has waived objection to personal jurisdiction. *McGowan v Hoffmeister*, 15 AD3d 297 (1st Dept 2005); *Allen v Blum*, 196 AD2d 624 (2d Dept 1993). Defendants did not plead an affirmative defense of lack of personal jurisdiction or move to dismiss the SAC under CPLR 3211(a)(8) prior to filing an answer. However, defendants denied the allegations in paragraph 15 of the SAC, which states that jurisdiction exists under CPLR 302(a). This is enough for this court to find that defendants have preserved their jurisdictional defense under our rules of liberal construction of the pleadings. *See*

511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 152 (2002) (pleadings must be liberally construed).

Turning now to the merits of jurisdiction over CerMed, CPLR 302(a)(1) provides that a New York court may exercise personal jurisdiction over a nondomiciliary who in person or through an agent transacts any business within the state. As noted earlier, 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, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." *Kruetter*, 71 NY2d at 467. "So long as a party avails itself of the benefits of the forum, has sufficient minimum contacts with it, and should reasonably expect to defend its actions there, due process is not offended if that party is subjected to jurisdiction even if not 'present' in the State." *Id.* at 466; *see Fischbarg v Doucet*, 9 NY3d 375 (2007) (defendants' purposeful attempt to establish attorney-client relationship and their direct participation in that relationship via call, faxes and emails projected them into state sufficiently to establish personal jurisdiction).

Here, it is undisputed that CerMed is located in California and does not generally do business in New York. The instant, subject contracts govern corporate merger transactional work in connection with listing CerMed on a German exchange.[3] Nonetheless, New York was very much at the heart of the parties' dealings. Though the parties dispute who reached out to

[3] The consulting contract originally provided that it is governed by California law, but the word "California" is crossed out in handwriting and replaced by "New York". The parties dispute the circumstances and implications of this revision. Resolution of this despite is not necessary for the purposes of this motion. Regardless of what substantive law governs, such law does not impact the jurisdictional inquiry because the contract does not contain a forum selection clause.

who first, this is irrelevant due to the single act nature of CPLR 302(a). *See Deutsche Bank Secs., Inc. v Montana Bd. of Investments*, 7 NY3d 65, 71 (2006). Pre-contract negotiations occurred in New York and over the phone with New York attorneys. Once the consulting contract was executed, the corporate transactional work was, as intended, performed by attorneys in New York at the behest of CerMed. Thus, CerMed purposefully availed itself of the privilege of conducting activities in New York. Further, there is a clear and substantial relationship between the business transaction and the claim asserted. Indeed, litigating this action in New York makes sense because many of the relevant witnesses are in this state. The fact that the contract was effectuated by CerMed's legal agents in New York is enough of a specific nexus to the subject transactions to warrant exercising personal jurisdiction over CerMed. *See Deutsche Bank*, 7 NY3d at 71 ("the growth of national markets for commercial trade, as well as technological advances in communication, enable a party to transact enormous volumes of business within a state without physically entering it").

Additionally, CerMed's characterization of the merger transaction "occurring" in Germany misses the mark. It is well known that much of the world's complex corporate litigation is performed by attorneys located in New York. Though the transaction may impact a foreign jurisdiction, such as Germany, the actual transactional work occurs in Manhattan. Where, as here, that is the case, averring that the services lack a New York nexus is unavailing. In light of the fact that some degree of negotiations over the contract occurred in New York with New York based employees and that the actual disputed transactional work occurred in New York, enough of a New York nexus exists to warrant the exercise of personal jurisdiction over CerMed. *See Deutsche Bank*, 7 NY3d at 71-72 (sophisticated out-of-state defendant subject to

personal jurisdiction in New York when complex financial services that defendant was hired to provide were performed in New York). The court, therefore, need not reach other factual questions raised in the parties' supplemental papers.[4]

Finally, it should be noted that defendants do not argue that the SAC fails to state a breach of contract claim against CerMed.[5] Additionally, since there are questions of fact regarding CerMed International's potential successor liability, the breach of contract claims against it survive as well. However, for the reasons set forth herein, the SAC is dismissed against all other defendants. Accordingly, it is

ORDERED that the motion to dismiss by defendants CerMed Corporation, Inc. (CerMed), CerMed International, Inc. (CerMed International), CerMed Delaware, Peter Gombrich, Eric Gombrich, Ken Holbrook, Jimmy Lee, Irene Podolak, Mary Ruberry, and Blaine Rieke to dismiss the Second Amended Complaint (the SAC) is granted in part as follows: (1) the SAC is dismissed against all defendants except CerMed and CerMed International; and (2) the motion is otherwise denied; and it is further

ORDERED that defendants' motion to supplement the record on Motion Seq. 002 is granted, and the court has considered the parties supplemental submissions; and it is further

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[4] That negotiations actually occurring in New York may not legally constitute "doing business" for general jurisdiction purposes is not an excuse to suggest that CerMed's agents never stepped foot in New York for any business purpose related to the subject transactions. Defendants' counsel knows that the requisite nexus for 302(a)(1) jurisdiction is much less demanding, and, hence, being less than candid about an actual trip to New York is not acceptable, even if that trip was nominally to meet a broker who may have been the impetus for the parties contracting. Additionally, as noted earlier, the consulting contract *does not* contain a California forum selection clause. Indeed, that contract does not contain *any* forum selection clause. Defendants' counsel's claim to the contrary [*see* Dkt. 43 at 17] is frivolous.

[5] The substantive viability of the breach of contract claims, which have multiple components, such as the failure to pay the monthly fee and whether the dilution is a breach of contract, was not raised by the parties. The court, therefore, will not opine on the merits at this time.

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre Street, Room 228, New York, NY, for a preliminary conference on February 19, 2015 at 10:30 in the forenoon.

Dated: February 2, 2015

ENTER:

J.S.C.