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

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S&E AZRILIANT, P.C.

Plaintiff,

Index No.
159858/2014

DECISION and ORDER

- against -

Mot. Seq. #001, #002

KEENEN WAYANS and SHAWN WAYANS,

Defendant.

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

Plaintiff, S&E Azriliant, P.C. ("Plaintiff" or "Azriliant"), brings this action to recover attorney's fees for legal services allegedly rendered to defendants, Keenen Wayans ("Keenen") and Shawn Wayans ("Shawn") (collectively, "Defendants" or the "Wayans"), between January 2005 and April 2011.

Defendants now move (Mot. Seq. #001) for an Order, pursuant to CPLR § 3211(a)(8), dismissing Plaintiff's complaint for lack of personal jurisdiction. In support, Defendants submit: the affidavit of Keenan, dated January 30, 2015.

Plaintiff opposes. In opposition, Plaintiff submits: the affidavit of Evan Azriliant, Plaintiff's vice president, dated February 11, 2015.

Additionally, Plaintiff moves (Mot. Seq. #002), by way of Order to show cause, for an Order, striking Defendants' affidavits in support of Defendants' motion to dismiss; striking Defendants' March 30, 2015 letter to the Court; or, alternatively, supplementing the record on Defendants' motion to dismiss. Defendants oppose.

Turning first to Defendants' motion to dismiss, 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;

Personal jurisdiction must be authorized under the CPLR and consistent with the Due Process Clause of the United States Constitution. In order to defeat a motion to dismiss for lack of personal jurisdiction, "the opposing party need only demonstrate that facts 'may exist' whereby to defeat the motion." (*Peterson v. Spartan Industries, Inc.*, 33 N.Y.2d 463, 466 [1974]; *American BankNote Corp. v Daniele*, 45 A.D.3d 338, 340 [1st Dep't 2007]; CPLR § 3211[d]). A prima facie showing of jurisdiction "simply is not required." (*Peterson*, 33 N.Y.2d at 467). Where a plaintiff seeks disclosure on the issue of personal jurisdiction pursuant to CPLR § 3211(d), the plaintiff need only set forth a "sufficient start" and show that its position is "not frivolous." (*Peterson*, 33 N.Y.2d at 467).

CPLR § 302(a)(1) 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) jurisdiction, "[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 pursuant to CPLR §302(a)(1), 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]). In either event, "it is the quality of the defendant[']s[] New York contacts that is the primary consideration." (*Fischbarg*, 9 N.Y.3d at 380). 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]).

Under the Due Process Clause, a 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 a state to exercise specific jurisdiction over a non-resident defendant consistent due process, the non-resident defendant's "suit-related conduct" must create a "substantial connection" with the forum state. (*Walden v. Fiore*, 134 S. Ct. 1115, 1121 [2014]). This connection must arise from contacts that the "defendant *himself*" creates with the forum state. (*Id.* at 1122, quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 [1985]). 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).

Defendants argue that the Wayans are California residents who did not transact any business with Plaintiff in New York. In the affidavit of Keenan, Keenan avers that Defendants did not travel to New York to Meet with Plaintiff, that Defendants' business meetings with Plaintiff took place exclusively in California, and that Defendants did not pay Plaintiff's travel expenses to California. (Keenan Aff. ¶¶ 2-3). Defendants further argue that Defendants initially came into contact with Defendants "through the solicitation of a non-attorney ('Azriliant's California Agent') residing in California." (*Id.* ¶ 3).

In the affidavit of Keenan, Keenan avers that during Defendants' initial meeting with Plaintiff, "the discussion focused on Azriliant's tax services, not where Azriliant was located. During the discussion, Evan Azriliant made clear that Azriliant understood that we were California residents, that entities formed by Ariliant for tax purposes would be principally California entities, and that our tax returns would be filed in California." (Id. ¶¶ 5-6). According to Keenan:

> Evan Azriliant further stated that he has many California clients and that he frequently traveled to California. He also stated that we would not incur any expenses for travel or other expenses. Evan Azriliant made it clear that Azriliant would be filing California tax returns in California, filing federal taxes for California residents (Shawn and I), and possibly setting up California limited liability companies. It was never contemplated that Azriliant would set up New York business entities or file tax returns in New York, and to our knowledge no

> business entities were set up in New York and no tax returns were filed in New York.

(*Id.* ¶ 7). Keenan further avers that, at this initial meeting, Defendants, "gave Evan Azriliant contact information for [Defendants'] business manager, who was also located in Los Angeles County, California" and that Defendants "had no other direct contact with Azriliant, other than the approximately annual meetings in California." (*Id.* ¶¶ 8-9).

Plaintiff, in turn, argues that Defendants projected themselves into New York throughout the course of Plaintiff's approximately four-year representation. (Pl's Aff. ¶ 2). In the affidavit of Evan Azriliant, Evan Azriliant avers:

> Defendants came to [Plaintiff] with a complicated business structure to manage their work as television and movie actors and various business entities, ranging from Nascar racing deals to real estate development. Defendants, personally and through a number of employees, including a business manager working and residing in New York, and outside professionals routinely communicated and worked with [Plaintiff's] staff to facilitate our representation in New York.

(*Id.*).

Evan Azriliant further avers:

> During the course of [Plaintiff's] work for defendants, I periodically communicated with defendants, keeping defendants informed of the services [Plaintiff] performed on their behalf. Defendant Keenen Wayans was primarily involved in the details of our work. Defendants regularly communicated with us in our office in New York. Defendant Keenen Wayans instructed me to "stay in direct touch." See copies of a February 22, 2005 email from Keenen Wayans and a sampling of other email communications from Keenen Wayans collectively annexed hereto as Exhibit B.

(*Id.* ¶ 11).

In addition, the affidavit of Evan Azriliant states:

> While I met with defendants and their agents in California and Vancouver, Canada, my calendar indicates I met with defendants in New York regarding S&E's legal services on December 28, 2004; December 29, 2004; February 17, 2005; June 11, 2005; June 13, 2005; and July 12, 2006. I regularly maintain my calendar in the ordinary course of [Plaintiff's] business, and believe it to be accurate.

(*Id.* ¶ 12). Evan Azriliant further avers that Defendants "projected themselves into New York through their agents. Defendants employed approximately ten people and also outside bookkeepers in California. Defendants regularly communicated with me and other [Azriliant] staff through their agents by telephone, email and facsimile transmission while we were in New York." (*Id.* ¶ 13).

Here, accepting Plaintiff's allegations as true, Plaintiff asserts that Defendants engaged in activities in New York, namely, that Defendants solicited Plaintiff here and that Defendants regularly communicated with Plaintiff in New York, via telephone, email, and facsimile during the course of an attorney-client relationship. However, Plaintiff does not submit the time records or calendar entries referenced in Evan Azriliant's affidavit, and Defendants deny soliciting Plaintiff in New York or authorizing any agent to do business with Plaintiff in New York on Defendants' behalf. Accordingly, Plaintiff makes a "sufficient start" toward demonstrating personal jurisdiction over Defendants pursuant to CPLR § 302(a)(1) such that additional disclosure is warranted to determine the issue of personal jurisdiction over Defendants.

Turning now to Plaintiff's motion to strike, Plaintiff seeks to strike the affidavits submitted in support of Defendants' motion to dismiss as false and perjurious. Plaintiff also seeks to strike a letter, dated March 30, 2015 (the "March Letter"), asking this Court to take judicial notice of proceedings in a California action which is pending between the parties.

Here, Plaintiff fails to demonstrate that the sanction of striking Defendants' affidavits is warranted at this time.

As far as the March Letter is concerned, "courts routinely take judicial notice of documents filed in other courts, again not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related

filings." (*Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 [2d Cir. 1991]). "The prohibition against accepting material in reply papers that was established in *Ritt v Lenox Hill Hosp.* (182 A.D.2d 560, 562, 582 N.Y.S.2d 712) and its progeny is directed at the introduction of 'new arguments in support of, or new grounds for the motion' (*Dannasch v Bifulco,* 184 A.D.2d 415, 417, 585 N.Y.S.2d 360) at a point in the proceedings when the opposing party has no opportunity to respond." (*Sanford v. 27-29 W. 181st St. Ass'n*, 300 A.D.2d 250, 251 [1st Dep't 2002]). Accordingly, to the extent that Defendants' March Letter asserts the California action as a new ground to dismiss Plaintiff's complaint, or to request a stay of this litigation, such arguments are not properly considered herein and will not be addressed.

Finally, with respect to that portion of Plaintiff's motion seeking to supplement the record on Defendants' motion to dismiss, supplemental submissions generally are discouraged and "should not be utilized as a matter of course to correct deficiencies in a party's moving or answering papers." (*Ostrov v. Rozbruch*, 91 A.D.3d 147, 155 [1st Dep't 2012]).

Wherefore it is hereby,

ORDERED that Defendants' motion (Mot. Seq. #001) is denied without prejudice to renew upon the completion of discovery on the issue of personal jurisdiction; and it is further

ORDERED that Plaintiff is directed to conduct discovery limited to the issue of personal jurisdiction over Defendants pursuant to CPLR § 302(a)(1); and it is further

ORDERED that all parties are directed to appear for a conference at 71 Thomas Street, Room 205, on September 29, 2015, at 9:30 a.m. to set a discovery schedule for the limited issue of personal jurisdiction over Defendants pursuant to CPLR § 302(a)(1); and it is further

ORDERED that Plaintiff's motion (Mot. Seq. #002) is denied.

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

Dated: July 23, 2015
JUL 23 2015

Eileen A. Rakower, J.S.C.