

America/International 1994 Venture v Mau
2015 NY Slip Op 32618(U)
March 17, 2015
Supreme Court, Nassau County
Docket Number: 602961-14
Judge: Vito M. DeStefano
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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 13
NASSAU COUNTY

AMERICA/INTERNATIONAL 1994 VENTURE
and SPRINGFIELD PETROLEUM CORPORATION,

Decision and Order

Plaintifs,

MOTION SUBMITTED:
January 7, 2015
MOTION SEQUENCE:01
INDEX NO.:602961-14

-against-

BRUCE MAU,

Defendant.

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
Affidavit in Support (Mau)	2
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In an action to recover damages for breach of a promissory note, the Defendant moves for an order pursuant to CPLR 3211(a)(8) dismissing the complaint for lack of personal jurisdiction.

Factual Background

The Defendant, Bruce Mau, was an investor in a "Joint Venture", a "leveraged investment to engage in oil and gas exploration" offered to "investors who had wealth, experience, high income and need for tax deductions". The tax deductions were made "possible by the investors' promissory note payable to the [joint venture] that provided the investors with a large initial tax deduction, while payments of interest and principal were deferred by the terms of the promissory note". The note, including all principal and accrued interest, was due and

payable on December 31, 2009. The Defendant did not pay on the note when it became due and, accordingly, Plaintiffs¹ commenced the instant action against the Defendant (Complaint at ¶¶ 3-7, 13).

According to the complaint, the Defendant, as an investor in the Joint Venture, “became a working interest owner in the Joint Venture, and as such began doing business in the state of New York”. The complaint also states that the program manager of the Joint Venture, Kraft Oil Services, Inc. (“Kraft”), acted as the agent of the Defendant as well as other investors in the Joint Venture (Complaint at ¶¶ 7, 8, 10). It is this agency relationship upon which the Plaintiffs attempt to predicate New York jurisdiction over the him.

The Defendant moves to dismiss the complaint on the ground that the court does not have personal jurisdiction over them.

For the reasons that follow, the motion is granted.

The Court’s Determination

To withstand a motion to dismiss for lack of personal jurisdiction (CPLR 3211[a][8]), the plaintiff need only make a *prima facie* showing that the defendant is subject to the personal jurisdiction of the court. The facts alleged in the complaint and the affidavits in opposition to the motion to dismiss are deemed true and must be construed in the light most favorable to the plaintiff, with all doubts resolved in the plaintiff’s favor (*Global Marine Power, Inc. v Kustom Engines & Performance Engineering, LLC*, 108 AD3d 501 [2d Dept 2013]; *Weitz v Weitz*, 85 AD3d 1153 [2d Dept 2011]; *Cornely v Dynamic HVAC Supply, LLC*, 44 AD3d 986 [2d Dept 2007]; *Brandt v Toraby*, 273 AD2d 429, 430 [2d Dept 2000]).

In deciding whether an action may be maintained in New York against a nondomiciliary defendant, the court must first determine whether jurisdiction exists under New York’s long-arm statute based upon the defendant’s contacts with this state; and, if it does, the court then determines “whether the exercise of jurisdiction comports with due process” (*LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214 [2000]). The ultimate burden is on the plaintiff to demonstrate that such requirements have been met (*Mejia-Haffner v Killington, Ltd.*, 119 AD3d 912 [2d Dept 2014]; *Goel v Ramachandran*, 111 AD3d 783, 788 [2d Dept 2013]; *Paterno v Laser Spine Inst.*, 112 AD3d 34, 39 [2d Dept 2013]).

¹ The joint venture hired Plaintiff, Springfield Resource Development Corporation (“Springfield”), to provide geophysical services. The note was assigned to Springfield (Complaint at ¶¶ 9, 16).

Under New York's long-arm statute, "a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent . . . transacts any business within the state or contracts anywhere to supply goods or services in the state" (CPLR 302[a][1]), regardless of whether that nondomiciliary has actually set foot in New York (*Fischbarg v Doucet*, 9 NY3d 375, 380 [2007]; *MPG Associates, Inc. v Roeske*, 112 AD3d 590 [2d Dept 2013]; *Executive Life Ltd. v Silverman*, 68 AD3d 715 [2d Dept 2009]). Whether a defendant has transacted business within New York is determined under the totality of the circumstances, and rests on whether the defendant, by some act or acts, has "purposefully avail[ed] itself of the privilege of conducting activities within [New York]" (*Ehrenfeld v Bin Mahfouz*, 9 NY3d 501, 508 [2007]). "Purposeful activities are those with which a defendant, through volitional acts, 'avails itself of the privileges of conducting activities within the forum State, thus invoking the benefits and protections of its laws'" (*Fischbarg v Doucet*, 9 NY3d at 380, *supra* quoting *McKee Elec. Co. v Rauland-Borg Corp.*, 20 NY2d 377, 382 [1967]). The long-arm statute is a "single-act" statute and, thus, evidence of even one such transaction is sufficient to invoke jurisdiction under CPLR 302(a)(1), even if a defendant never enters New York, so long as the defendant's activities were purposeful and there is some articulable nexus between the business transacted and the cause of action sued upon (*Deutsche Bank Sec., Inc. v Montana Board of Investments*, 7 NY3d 65, 71 [2006] quoting *Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]; *Executive Life Ltd. v Silverman*, 68 AD3d at 717, *supra*; *Gottlieb v Merrigan*, 119 AD3d 1054 [3d Dept 2014]). "[I]t is the quality of the defendants' New York contacts that is the primary consideration" (*Fischbarg v Doucet*, 9 NY3d at 380, *supra*).

In support of the motion, the Defendant submitted his affidavit wherein he states that in 1994, while living in Illinois, he was approached by his accountants, Leonard Dubow and Jeffrey Dubow, about the opportunity to invest in an oil and gas "Joint Venture". The accountants' place of business was in Illinois, all meetings and discussions with the accountants about the Joint Venture took place in Illinois and on December 17, 1994, the Defendant executed a promissory note (in Illinois) in the amount of \$315,600 made payable to the Plaintiff America/International 1994 Venture and delivered the note to the accountants at their office in Illinois. The Defendant further avers that after investing in the venture: he has "not maintained any substantial, continuous or systematic business activities in New York"; he was "not employed by or involved with any aspect of the operations or management of the Joint Venture"; he never "traveled to New York for a business purpose related to the Joint Venture"; and that his communication with representatives of the Joint Venture was limited to one phone call and one letter. In this regard, the Defendant notes that he has not maintained an office, post office address, telephone number, bank account or any other physical presence in New York, nor does he own or lease any property in New York, or conduct any business in New York. The Defendant currently resides in Glenview, Illinois (Defendant's Affidavit in Support of Motion).

The Defendant's submissions establish he does did not have minimum contacts with New

York sufficient to subject him to personal jurisdiction in the State.

In opposition, the Plaintiffs argue that the Defendant "engaged in purposeful business activities through the actions of his agent, Kraft", and that to "facilitate his entry into the joint venture as a working owner, [Defendant] appointed Kraft as his attorney-in-fact for a number of business purposes, including but not limited to the execution of business orders and drilling and operating agreements, and the collection and distribution of monies." Plaintiffs further argue that "Kraft conducted business for [Defendant] with his consent" and that the Defendant "had the requisite control over Kraft for purposes of establishing agency" (Plaintiffs' Memorandum of Law in Opposition at pp 2-3, 5).

In this regard, the Subscription Agreement, which defined the relationship between the Defendant and the agent Kraft, contains the following relevant provisions:

4.1 General Each Investor shall have equal rights in the management of the Program's [America International 1995 Venture] business subject to the appointment of the Manager [Kraft] as Agent and Attorney-in-Fact.

4.2 Appointment of Agent and Attorney-in-Fact

A. The parties hereto by the execution of this Agreement hereby appoint and authorize Kraft Oil Services, Inc. and its partners to act as agent and attorney-in-fact for each of the parties hereto forth in the Memorandum with full power and authority . . . as may be necessary or appropriate to carry out the provisions or purposes of this Agreement

* * *

The Manager shall have, without the further consent of the Investors, except as set forth below, the power to do any and all things necessary or incident to the management and conduct of the business of the Program and may, without limitation of any power or authority, do the following if, as and when it deems necessary, appropriate or advisable:

* * *

B. The appointment by all Investors of the Agent as attorney-in-fact shall be deemed to be a power coupled with an interest This power of attorney shall be binding on the parties hereto, their heirs and assigns, until written notice of revocation is received by a majority of the Investors (Ex. "2" to Affidavit in at ¶¶

4.1 and 4.2).

The Subscription Agreement also has a governing law provision which states that the Agreement shall “be construed in accordance with and governed in all respects by the laws of the State of New York applicable to an agreement executed in and performed entirely within said state” (Ex. “2” to Affidavit in Opposition at ¶ 13.2).² The Plaintiffs argue that a forum selection clause in an agreement “affords a sound basis for the exercise of personal jurisdiction over a foreign defendant” (Plaintiffs’ Memorandum of Law in Opposition at p 6).³ However, a parties’ choice of law provision in a joint venture agreement is insufficient, by itself, to serve as a predicate for jurisdiction (*Executive Life Ltd. v Silverman*, 68 AD3d 715, *2 [2d Dept 2009]; *Peter Industrie v Lanhardt*, 173 AD2d 70, 72 [1st Dept 1991]). “Choice of law questions are significantly different from questions of jurisdiction” (*Lupton Associates, Inc. v Northeast Plastics, Inc.*, 105 AD2d 3, 8 [4th Dept 1984] [plaintiff may acquire personal jurisdiction over a nondomiciliary even though a court may be required to apply the law of a sister state]).

Notwithstanding the language of the Subscription Agreement wherein the Defendant appointed the program manager, Kraft, as his attorney in fact, the Defendant argues that no agency relationship existed between him and Kraft which would subject him to jurisdiction in New York. The Plaintiffs must demonstrate that the Defendant’s agent engaged in purposeful activities in New York in relation to the transaction for the benefit of and with the knowledge and consent of the Defendant and that the Defendant exercised some control over the agent in the Joint Venture (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]; *Lupton Associates v Northeast Plastics*, 105 AD2d at 7, *supra* [“The activities of a representative of a nondomiciliary in New York may be attributed to it . . . if it requested the performance of those activities and the activities benefit it, regardless of whether the representative acted as an agent or independent contractor]). The Plaintiffs have failed to make such a showing.

Although the complaint asserts that “the program manager of the Joint Venture acted as the agent” of the Defendant, there are no allegations, nor any supporting evidentiary facts, establishing that Defendant had control over Kraft (*Polansky v Gelrod*, 20 AD3d 663 [3d Dept

² The court notes that the “Joint Venture” was organized under the laws of New York with its principal place of business in Great Neck, New York.

³ Here, while the agreement contains a choice of law provision in favor of New York law, a choice of law provision is neither a forum selection clause nor a consent to jurisdiction (*see Tegra S.A. v Bombardier, Inc.*, 80 AD3d 443 [1st Dept 2011]). Notably, the Subscription Agreement does not contain a forum selection clause.

2005]). "The critical factor is the degree of control the defendant principal exercises over the agent" (*Barbarotto International Sales Corp. v Tullar*, 188 AD2d 503 [2d Dept 1992]; *Lupton Associates v Northeast Plastics*, 105 AD2d at 7, *supra*). In this regard, the court notes that the Subscription Agreement does not authorize or empower the Defendant to control Kraft with respect to the Joint Venture. To the contrary, the Subscription Agreement states that Kraft shall have the "full power and authority" to act on behalf of the Defendant "without the further consent" of the Defendant and may "do any and all things necessary" to conduct the business of the venture "without limitation of any power or authority" to act when and if Kraft "deems [it] necessary, appropriate or advisable". The Subscription Agreement recites that Kraft, as "agent", has the full power to act.

In addition, the Defendant's limited right to terminate his relationship with Kraft further undermines the existence of an agency relationship between him and Kraft that would subject him to jurisdiction in New York based on Kraft's actions (*see Wilson Sullivan Co. v International Paper Makers Realty Corp.*, 307 NY 20 [1954] ["It is well settled that, with but a few exceptions not pertinent to the facts of this case, a principal has the power to revoke at any time his agent's authority to represent him"]). Specifically, the Subscription Agreement recites that only a majority of the investors can revoke the power of attorney given to Kraft (Ex. "2" to Affidavit in Opposition).


In this same vein, the Subscription Agreement also indicates that the power of attorney given to Kraft by the Defendant was a "power coupled with an interest", one in which the agent has an interest in the subject matter underlying the power (*see Frankel v J.P. Morgan Chase & Co.*, 76 AD3d 664 [2d Dept 2010]). A power coupled with an interest is generally irrevocable, which, as applicable to the facts at bar, does not permit the Defendant to revoke his appointment of Kraft as attorney in fact.

Based on the foregoing, it is hereby

Ordered that the Defendant's motion is granted and the complaint is dismissed.

This constitutes the decision and order of the court.

Dated: March 17, 2015


 Hon. Vito M. DeStefano, J.S.C.

ENTERED

MAR 20 2015
 NASSAU COUNTY
 COUNTY CLERK'S OFFICE