Telecom Italia Sparkle S.P.A. v Marcatel Com S.A. de C.V.
2016 NY Slip Op 30041(U)
January 6, 2016
Supreme Court, New York County
Docket Number: 653572/2012
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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TELECOM ITALIA SPARKLE S.P.A.,

Plaintiff,

DECISION/ORDER
Index No. 653572/2012

-against-

MARCATEL COM S.A. DE C.V.

Defendant.

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HON. SALIANN SCARPULLA, J.:

In this action, defendant Marcatel Com S.A. de C.V. ("Marcatel" or "defendant") renews its motion to dismiss Telecom Italia Sparkle S.p.A.'s ("Telecom Italia" or "plaintiff") complaint pursuant to CPLR § 3211(a)(8) for lack of personal jurisdiction. Marcatel alternatively argues that dismissal is appropriate for plaintiff's claims pursuant to CPLR §§ 327, 3211(a)(3), and 3211(a)(7).

This case arises out of an alleged agreement between Marcatel, a Mexican corporation headquartered in Monterrey, Mexico, and Telecom Italia, an Italian corporation with its principal place of business in Rome, Italy, whereby Marcatel ordered services from Telecom Italia for itself and for its affiliates, Vivaro Corporation ("Vivaro"), STI Prepaid, LLC ("STI Prepaid"), and STI Telecom Inc. f/k/a Epana Networks Inc. ("Epana" and collectively with Vivaro and STI Prepaid "Debtors") to use with their own telecommunications offerings ("Services"). Telecom Italia alleges that Marcatel and Plaintiff agreed that Plaintiff would provide Services and that Marcatel

"*would cause [Telecom Italia] to be paid* within thirty days thereof (the 'Agreement')." (Emphasis added)

Telecom Italia does not allege that Marcatel failed to pay for any Services that Marcatel directly used. However, over time, the Debtors were unable to pay Telecom Italia for the Services they used. The Debtors, whose principal place of business is allegedly located at 1250 Broadway, New York, New York, filed for Chapter 11 bankruptcy in the Southern District of New York on September 5, 2012. In their Schedule F, the Debtors listed Telecom Italia as an unsecured creditor in the amount of $1,801,060.13.

Apparently recognizing its precarious position in the bankruptcy proceeding as an unsecured creditor of the Debtors, in October 2012, Telecom Italia sued the Debtors' foreign affiliate, Marcatel, in this Court seeking to recover the Debtors' debt from Marcatel. In its complaint, Telecom Italia asserts causes of action for breaches of contract; breach of contract as a third-party beneficiary; promissory estoppel; quantum meruit; account stated; and for liability under an alter ego theory.

In April 2013, Marcatel filed a motion to dismiss pursuant to CPLR § 3211(a)(8) for lack of personal jurisdiction, § 3211(a)(3) to dismiss the alter ego claim for lack of standing, and § 3211(a)(7) to dismiss the breach of contract claims. Judge Kapnick directed the parties to conduct jurisdictional discovery and allowed the defendant to renew its motion to dismiss at the close of jurisdictional discovery.

The complaint is replete with generalized and lumped-together allegations in support of New York jurisdiction over Marcatel. However, jurisdictional discovery

revealed important evidence related to the transaction and the relationship between Marcatel and the Debtors, some of which directly refutes the allegations in the complaint. For example, although plaintiff alleges that Marcatel is the parent of Vivaro, and that Vivaro wholly owns STI Prepaid and Epana, this allegation is refuted in Marcatel's papers. Gerardo Adrian Medellin de la Cerda, Marcatel's "corporate general counsel," submits an affidavit ("Medellin Affidavit") on this motion, in which he swears that Vivaro is wholly owned by a company that also owns slightly less than 49% of Marcatel. Thus, rather than having a parent-subsidiary relationship, as alleged by Telecom Italia, Marcatel and the Debtors' are simply partially owned by the same parent company.

In addition, Telecom Italia now concedes that it provided invoices for telecommunication services to STI Prepaid (not Marcatel), but nevertheless claims "Marcatel requested that Telecom Italia send invoices for services, including those provided on the direct interconnections to Marcatel, to STI Prepaid in New York." Similarly, expense reports of plaintiff's Roberto Migliozzi ("Migliozzi") list STI Prepaid, not Marcatel, as the party with which he met and transacted.

In light of the facts revealed by jurisdictional discovery, Marcatel now renews its motion to dismiss. Amongst other arguments it makes in this motion, Marcatel argues that this Court does not have jurisdiction over it pursuant to CPLR § 302(a)(1). Marcatel additionally asks me to award sanctions against Telecom Italia.

Marcatel's argument concerning this Court's lack of jurisdiction over it is based on its showing that Marcatel is not the parent of Debtors, as discussed above, and it has

not controlled Debtors. Moreover, Medellin avers without contradiction that it and the Debtors "constitute independent revenue and cost centers."

Further, Marcatel does not maintain an office anywhere in New York State; Marcatel has no New York employees; and "Marcatel has no license from the Federal Communications Commission ('FCC') to provide telecommunications services in the United States of America." Marcatel also emphasizes that it never directly entered into any written agreement for services with Telecom Italia anywhere, nor did it ever execute a written guarantee of Debtors' debt to Telecom Italia. Marcatel argues that these facts make out its *prima facie* burden of showing that New York lacks personal jurisdiction over it.

In opposition, Telecom Italia argues that New York may exercise jurisdiction over Marcatel based upon actions Marcatel undertook through agents in New York. Telecom Italia first highlights that Migliozzi met with Diana Daniels ("Daniels") in New York in October 2010, when Daniels was a Marcatel Vice President. Thereafter and through 2012, Telecom Italia claims, Daniels presented herself to Telecom Italia's representatives "as a Marcatel executive," and communicated with Telecom Italia's representatives with a marcatel.net email address and using an email signature block that indicated that she was a Marcatel VP. Telecom Italia contends Daniels met Migliozzi in New York at various times to discuss business.

Telecom Italia also points to a February 2012 meeting ("February 2012 Meeting") that occurred in New York and was attended by individuals previously identified to plaintiff as the CEO of Marcatel; Margain, the CFO of Marcatel; "the Senior VP Carrier

Infrastructure and WS Business;" and "Senior VP Finance (CFO for our NY office)." At this meeting, Margain gave Migliozzi his business card, which identified him as Marcatel's CFO. During this meeting, plaintiff contends, "Marcatel sought to allay Telecom Italia's concerns, reiterated its responsibility for the relationship, its financial strength, and that it would ensure payment of all amounts due." Plaintiff furthermore claims, "[r]elying on the assurances provided at the February 2012 Meeting, Telecom Italia continued to provide international telecommunications services to Marcatel and its related companies."[1]

Additionally, Telecom Italia argues that Miguel Lavin Segura ("Lavin") negotiated a Payment Plan Agreement and communicated from Mexico with plaintiff by phone and email, holding himself out as a Marcatel employee and using a Marcatel email address. Plaintiff further contends that "Marcatel *caused payments aggregating $500,000.00 to be made* to Plaintiff in June 2012 pursuant to the Payment Plan Agreement." (Emphasis added) As to the foregoing allegation, Telecom Italia admits that STI Prepaid actually made the $500,000 payments. The allegation that Marcatel *caused* the transfers to be made is based solely on Telecom Italia's surmise because the money came "from a bank account associated with an address that matches the address of Marcatel International, Defendant's U.S. staffing company."

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[1] In his affidavit in opposition, Medellin points out that the February 2012 Meeting was attended mostly by employees who had been transferred to Vivaro—Robert Lacy ("Lacy"), Daniels, and Victor Robles ("Robles")—and the Marcatel employee who attended the meeting, Roberto Margain ("Margain"), attended in his capacity as a member of the Vivaro board of directors.

Telecom Italia additionally highlights the direct IP interconnections set up between it and Marcatel or its affiliates. According to plaintiff, two of the IP addresses are owned by Marcatel. Plaintiff also argues that "[b]oth Marcatel and Marcatel's affiliates benefitted from the services provided by Telecom Italia pursuant to the Agreement, as evidenced by the fact that Marcatel and its affiliates sent traffic to Telecom Italia over the interconnections established pursuant to the Agreement." Additionally, plaintiff highlights the fact that Debtors' employees consulted with Marcatel engineers in Mexico regarding the interconnections. According to Telecom Italia, the foregoing is sufficient to confer New York jurisdiction over Marcatel.

Discussion

"While the ultimate burden of proof rests with the party asserting jurisdiction, the plaintiffs, in opposition to a motion to dismiss pursuant to CPLR 3211 (a) (8), need only make a prima facie showing that the defendant was subject to the personal jurisdiction of the Supreme Court." *Cornely v. Dynamic HVAC Supply, LLC*, 44 A.D.3d 986, 986 (2d Dep't 2007) (internal citation omitted).

Pursuant to CPLR 302(a), "a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent: 1. transacts any business within the state or contracts anywhere to supply goods or services in the state." "'To determine whether a party has "transacted business" in New York, courts must look at the totality of circumstances concerning the party's interactions with, and activities within, the state.'" *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 171 F.3d 779, 787 (2d Cir. 1999), *quoted in Scheuer v. Schwartz*, 42 A.D.3d

314, 316 (1st Dep't 2007); *see also Farkas v. Farkas*, 36 A.D.3d 852, 853 (2d Dep't 2007).

CPLR 302(a)(1) "applies where the defendant's New York activities were purposeful and substantially related to the claim. 'Purposeful' activities are defined as '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.'" *C. Mahendra (NY), LLC v. Nat'l Gold & Diamond Ctr., Inc.*, 125 A.D.3d 454, 457 (1st Dep't 2015) (citations and internal quotation marks omitted). Jurisdiction pursuant to CPLR 302(a)(1) may be predicated on acts occurring before or after the execution of a contract. *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 456–57 (1965).

Here, Marcatel has shown that it has no obvious, direct connection to New York. It has no office in New York, nor does it generally transact business here. Telecom Italia nevertheless argues that Marcatel entered into and performed under the Agreement and Payment Plan Agreement through agents in New York. Plaintiff also relies upon the direct interconnections established between Marcatel and Telecom Italia, which indicate Marcatel received the benefit of and performed under the Agreement.

To exercise jurisdiction over a non-domiciliary based on the domestic actions of the non-domiciliary's agent,

> Plaintiff need not establish a formal agency relationship between [Marcatel] and [an agent]. He need only convince the court that [an agent] engaged in purposeful activities in this State in relation to his transaction for the benefit of and with the knowledge and consent of [Marcatel] and that they exercised some control over [the agent] in the matter.

Kreutter v. McFadden Oil Corp., 71 N.Y.2d 460, 467 (1988) (internal citations omitted).

Telecom Italia essentially claims that Marcatel entered into and performed under agreements through alleged Marcatel agents in New York, specifically: Daniels; attendees at the February 2012 Meeting; and Lavin.

First, Telecom Italia points to meetings between Migliozzi and Daniels in New York where the parties "discuss[ed] the possibility of a relationship, to negotiate key terms of the Agreement or to discuss the parties' performance under the Agreement." Migliozzi states that "[t]he purpose of [an October 2010] meeting was introductory and to find out more about Marcatel, as well as to discuss the possibility of entering into the [A]greement."

The October 2010 meeting is insufficient to subject Marcatel to jurisdiction in New York, as "'meetings in the forum state that are exploratory, unproductive, or insubstantial are insufficient to establish requisite contacts with the state.'" *Greco v. Ulmer & Berne L.L.P.*, 23 Misc.3d 875, 889 (Sup Ct, Kings County 2009) (quoting *United Computer Capital Corp. v. Secure Prods. L.P.*, 218 F. Supp. 2d 273, 278 (N.D.N.Y. 2002)).

Furthermore, jurisdiction over Marcatel may not be based on the theory that Daniels was acting as Marcatel's agent at subsequent meetings because Telecom Italia has put forth no evidence "that [Marcatel] exercised some control over [Daniels] in the matter." *Kreutter*, 71 N.Y.2d at 467; *OneBeacon Am. Ins. Co. v. Newmont Mining Corp.*, 82 A.D.3d 554, 555 (1st Dep't 2011). Marcatel has shown that at the time Daniels

subsequently met with Telecom Italia, she was an employee of Vivaro, not Marcatel. The fact that Daniels used a marcatel.net email address and a signature block that indicated she was a Marcatel VP, and that at some point she spoke at a conference with a Marcatel title, are insufficient evidence to show that Marcatel actually exercised "some control over [her]," during these subsequent meetings. *Kreutter*, 71 N.Y.2d at 467.[2]

Plaintiff next argues that the February 2012 Meeting was attended by Marcatel's agents—Lacy, Daniels, Robles, and Margain—in New York. Marcatel, however, has shown that Lacy, Daniels, and Robles were not Marcatel employees at the time, and instead were Debtors' employees. Accordingly, plaintiff has not put forth sufficient evidence of Marcatel's control over Lacy, Daniels, or Robles, and therefore their actions at the February 2012 meeting do not confer jurisdiction over Marcatel. *See Kreutter*, 71 N.Y.2d at 467.

Marcatel maintains that Margain attended the February 2012 Meeting as a Vivaro director, but plaintiff disputes this and notes that Margain distributed his business card at the meeting, which listed his position as Marcatel's CFO. Accepting plaintiff's contention that Margain attended the meeting in his capacity as a Marcatel employee on this motion to dismiss, *see Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994), the issue is whether this single meeting is enough to confer jurisdiction.

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[2] Telecom Italia makes much of its contact with Daniels in New York. Marcatel, however, has shown through testamentary and documentary evidence that, at the time of these contacts, she was a Vivaro employee. Unfortunately, Daniels is no longer employed by Vivaro, is not in the United States, and is thus unavailable to explain her continued use of the marcatel.net email address and signature block.

While "the nature and purpose of a solitary business meeting conducted for a single day in New York may supply the minimum contacts necessary to subject a non-resident participant to . . . jurisdiction . . ., physical presence alone cannot talismanically transform any and all business dealings into business transactions under CPLR 302 (subd [a], par [1])." *Presidential Realty Corp. v. Michael Square W. Ltd.*, 44 N.Y.2d 672, 673 (1978) (internal citations omitted). "[T]he 'quality of defendants' contacts' is the primary consideration in deciding the question of long-arm jurisdiction." *C. Mahendra*, 125 A.D.3d at 458.

Here, even assuming that Margain attended the single meeting in New York as a representative of Marcatel and not Vivaro, this one meeting does not demonstrate that Marcatel was "'avail[ing] itself of the privilege of conducting activities within the forum State," particularly because the meeting was general and did not result in Marcatel executing any written, enforceable agreement to be responsible for the Debtors' debts. *See Presidential Realty Corp.*, 44 N.Y.2d at 673–74 (finding no jurisdiction when contract was negotiated in Atlanta, New Orleans, and Mobile; before the real estate closing the parties met in New York, which "meeting allegedly resulted in conciliatory modifications incorporated into an agreement which the defendants' representative concededly signed at the end of the meeting;" and the deal ultimately closed in Mobile); *McKee Elec. Co. v. Rauland-Borg Corp.*, 20 N.Y.2d 377, 379–80, 382 (1967) (finding no jurisdiction under CPLR 302(a)(1) where a "representative" of defendant, an Illinois corporation, went into New York "for approximately two hours" to discuss issues

plaintiff was having with engineers). Therefore, Margain's presence at and participation in the February 2012 Meeting did not subject Marcatel to this Court's jurisdiction.

Lavin's alleged negotiation of the Payment Plan Agreement also fails to subject Marcatel to jurisdiction in this State as the negotiation of this agreement is divorced from any contacts with New York. *See* CPLR § 302(a)(1). Migliozzi affirmed that Lavin, who he concedes, "lived and worked in Mexico, not in the United States," communicated with plaintiff (not in New York) via email, including sending Telecom Italia the Payment Plan Agreement. He also affirmed that Lavin called plaintiff. There is no indication that Lavin's actions were connected in any way to New York.

Additionally, while Migliozzi affirmed that "Marcatel caused STI Prepaid to make the first installment payment to Telecom Italia," there is no indication that these payments were connected to New York, nor is there any evidence as to how "Marcatel caused payments aggregating $500,000.00 to be made to Plaintiff in June 2012 pursuant to the Payment Plan Agreement."

Telecom Italia also maintains that Marcatel should be subject to jurisdiction in New York because there were two direct interconnections between it and Marcatel, and "Marcatel managed these interconnections, and the relationship with Telecom Italia, through its own employees and through its agents – employees of its New York affiliates – who took actions in New York directly related to the Marcatel-Telecom Italia interconnections on behalf of Marcatel." However, as Marcatel notes, the fact that the interconnections exist does not subject Marcatel to this Court's jurisdiction, as the interconnections do not have a "physical location." Further, without any allegations

related to Marcatel's control over the Debtors' employees, the fact that Debtors' employees' contacted Marcatel engineers about the interconnections does not subject Marcatel to jurisdiction. *See Kreutter*, 71 N.Y.2d at 467.

In sum, I find that Marcatel, a Mexican affiliate of bankrupt Debtors who concededly owe money to Telecom Italia, has sufficiently shown that it is not subject to jurisdiction in New York in connection with the transactions at issue in this action. However, I decline to award sanctions to Marcatel, as I find that Telecom Italia has not acted frivolously in pursuing this litigation.

In accordance with the foregoing, it is hereby

ORDERED that the motion of defendant Marcatel Com S.A. de C.V. to dismiss the complaint herein is granted and the complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk of Court is directed to enter judgment accordingly.

This constitutes the decision and order of this Court.

DATE : 1/6/16

SALIANN SCARPULLA, JSC