

Johnson v Golia

2016 NY Slip Op 30378(U)

March 3, 2016

Supreme Court, New York County

Docket Number: 653661/15

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
MAX JOHNSON,

-against- Plaintiff,

Index No. 653661/15
DECISION/ORDER

LUCIANO GOLIA and LUCIANO GOLIA INC.,
-----X
Defendants.

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affidavits in Opposition.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff Max Johnson commenced the instant action against defendants Luciano Golia (“Golia”) and Luciano Golia Inc. (“Golia Inc.”) seeking to recover damages arising out of an alleged breach of a contract entered into by the parties. Defendants now move for an Order pursuant to CPLR § 3211(a)(8) dismissing the complaint on the ground that this court lacks personal jurisdiction over them. For the reasons set forth below, defendants’ motion is denied.

The relevant facts are as follows. According to the complaint, in or around December 2013, plaintiff, a professional musician and resident of New York, contracted with defendant Golia, a resident and citizen of Italy, and Golia Inc., a corporation domiciled in Michigan which is owned by Golia, to purchase a custom upright bass. The complaint alleges that defendants agreed to construct the instrument according to plaintiff’s detailed specifications and according to an agreed upon schedule. Over a year after the agreed upon delivery date, the instrument was shipped from defendant in Italy to defendant’s facility in Michigan and then to plaintiff in New York. However,

plaintiff alleges that the instrument materially deviated from his specifications and that it was “unplayable.” When approached by plaintiff, defendants offered him a \$500 discount and the option to return the instrument to defendant’s Michigan facility for repairs. However, plaintiff declined and instead commenced the instant action against defendants seeking to recover the amount he paid to defendants for the instrument. Defendants now move to dismiss the action on the ground that this court lacks personal jurisdiction over them.

While plaintiff’s complaint need not allege that the court has a basis for personal jurisdiction, *Fischbarg v. Doucet*, 9 N.Y.3d 375 (2007), when personal jurisdiction is challenged, the plaintiff has the burden of proving a basis of personal jurisdiction. See, e.g., *Arroyo v. Mountain School*, 68 A.D.3d 603 (1st Dept 2009). In New York, personal jurisdiction may be exercised over a defendant who is subject to general or specific jurisdiction.

As an initial matter, plaintiff has failed to establish that defendants are subject to general jurisdiction. Under CPLR § 301, general jurisdiction exists over a foreign individual or corporation when said individual or corporation is “engaged in such a continuous and systematic course of ‘doing business’ here as to warrant a finding of its ‘presence’ in this jurisdiction.” *McGowan v. Smith*, 52 N.Y.2d 268, 272 (1981). Here, plaintiff does not allege sufficient facts to support a finding of general jurisdiction as plaintiff has failed to assert that either defendant is engaged in such continuous and systematic course of doing business in New York to be subject to general jurisdiction.

However, plaintiff has established that defendants are subject to specific jurisdiction. CPLR § 302(a)(1) allows for the exercise of specific jurisdiction over an out-of-state defendant if the defendant “transacts any business within the state or *contracts anywhere to supply goods or*

services in the state” (emphasis added). “By this single act statute . . . 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.” *Deutsche Bank Sec., Inc. v. Montana Bd. Of Invs.*, 7 N.Y.3d 65, 71 (2006) (internal quotations omitted). “Purposeful activities are volitional acts by which the non-domiciliary ‘avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.’” *Paterno v. Laser Spine Institute*, 24 N.Y.3d 370, 376 (2014) (quoting *Fischbarg v. Doucet*, 9 N.Y.3d 375, 380 (2007)). “[D]etermining what facts constitute ‘purposeful availment’ . . . always requires a court to closely examine the defendant’s contacts for their quality.” *Licci v. Lebanese Conadian Bank, SAL*, 20 N.Y.3d 327, 338 (2012). The First Department has found that there is specific jurisdiction over a defendant who contracts outside of New York to supply goods in New York and shipped those goods to New York purchasers for use in New York. See *Torrioni v. UNISUL, Inc.*, 176 A.D.2d 623 (1st Dept 1991).

In the present case, plaintiff alleges sufficient facts to support a finding that defendants transacted business in this state to subject defendants to specific jurisdiction. Specifically, plaintiff alleges that over the course of a year, defendants communicated with plaintiff, while he was a resident of New York, and “enticed” him into contracting with them; that defendants sent to New York the contract for plaintiff to sign and that plaintiff signed said contract in New York and sent it back to defendants; that during construction of the instrument, defendants reached out to plaintiff in New York regarding the instrument’s progress and cost; and that defendants delivered the instrument to plaintiff in New York, specifically, that defendants arranged the shipping of the

instrument from Italy to the facility in Michigan and then from Michigan to New York. New York courts have held that such an arrangement does give rise to jurisdiction over a defendant in this state. See *Torrioni*, 176 A.D.2d at 624 (“[d]efendant...is subject to long-arm jurisdiction under CPLR § 302(a)(1)...since defendant...manufactured a machine in Florida which allegedly caused an injury in New York, contracted to sell that and other machines to New York purchasers for use in New York, and subsequently arranged for direct shipment of those machines.”) As the defendants contracted outside New York to supply the instrument to plaintiff in New York, the court finds that defendants are subject to specific jurisdiction in this state and thus, their motion to dismiss must be denied.

Defendants’ assertion that they should not be subject to specific jurisdiction in New York because plaintiff “independently took care of” shipping the instrument and that defendants were not involved at all is without merit. Plaintiff has provided an e-mail in which Golia offered to ship the instrument with YRC, a company defendants regularly work with, and offered to split the cost of shipping with plaintiff, an offer that plaintiff accepted. Additionally, the bill of lading for the instrument lists defendant Golia as the shipping contact and includes the address of Golia’s workshop and his phone number in Michigan.

Finally, defendants’ assertion that they should not be subject to specific jurisdiction in New York because the exercise of such jurisdiction would violate traditional notions of fair play and substantial justice is also without merit. A defendant seeking to overturn jurisdiction on due process grounds must show that answering a suit would be “so gravely difficult and inconvenient that [the defendant would] unfairly [be put] at a severe disadvantage in comparison to his opponent.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985). Additionally, the “fair

play and substantial justice” requirement “is in essence another way of asking what is reasonable” and “a defendant who purposefully has directed [its] activities at forum residents must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.” *LaMarca v. Pak-More Mfg. Co.*, 95 N.Y.2d 210, 217-18 (2000).

Here, defendants have failed to establish that the exercise of jurisdiction over them in New York would be unreasonable or that litigating the lawsuit in New York would be so difficult and inconvenient that defendants would be put at a severe disadvantage in comparison to plaintiff.

Defendants merely assert that it is inconvenient for them to litigate in New York and that it would be more convenient to litigate in a forum such as Michigan, which, defendants allege, is the primary location of all witnesses and evidence with the exception of plaintiff. However, such assertions fail to meet the burden of establishing such unreasonableness or severe or grave disadvantage. Indeed, while some of the witnesses may be out of state, the instrument itself, which will likely be a relevant piece of evidence, is located in plaintiff’s apartment in New York. Further, plaintiff has retained an expert witness who also resides in New York and the shipping company used by defendants is also located in New York. Thus, as defendants have not established that the exercise of jurisdiction over them in New York violates due process, their motion to dismiss must be denied.

Accordingly, defendants’ motion to dismiss the instant action on the ground that this court lacks personal jurisdiction over them is denied. This constitutes the decision and order of the court.

Dated: 3/3/16

Enter: _____

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J.S.C.
CYNTHIA S. KERN
J.S.C.