McCracken v Adams

2016 NY Slip Op 30492(U)

March 22, 2016

Supreme Court, New York County

Docket Number: 652606/2015

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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Jeffrey McCracken and Karen Randall p/k/a Karen Embry,

Plaintiffs,

Index No. 652606/2015

-against-

DECISION AND ORDER
Motion Sequence No. 002

Julian Adams, Solar Filmworks, LLC and David Winter,

Defendants.

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Anil C. Singh, J.:

This is an action sounding in fraud and negligent misrepresentation brought by plaintiffs Jeffrey McCracken and Karen Randall (together, "plaintiffs") against defendants Julian Adams, Solar Filmworks, LLC, and David Winter (collectively, "defendants"). Defendants, *pro se*, move to dismiss claims for lack of personal jurisdiction, absence of a necessary party and forum non conveniens. Defendants oppose and in the alternative request that the court grant jurisdictional discovery pursuant to CPLR 3211(d).

The Complaint states that plaintiffs are professional screenwriters and co-wrote the screen play for the picture at issue (the "Picture"). In or around April 2013, after the screenplay for the Picture was finished, plaintiffs began to actively seek out entities to potentially finance the production of the Picture. Plaintiffs further allege in the Complaint that "in or around May 2013", defendants approached plaintiffs and made the "first of many representations" that were later

found to be untrue. Plaintiffs claim that defendants represented to them that Legacy Point, a contact of defendants, would agree to finance 100% of the Picture and that Legacy Point had the "money in hand" ready to go. The Financing Agreement ("agreement") was signed on June 13, 2013 by Karen Embry, Jeffrey McCracken, Anne Brensley on behalf of Legacy Point Entertainment and Julian Adams on behalf of Solar Filmworks, LLC. According to the agreement section 1, "Legacy Point obligates itself to structure 100% of the Financing of the Film." Moreover, the agreement also provides that Julian Adams would be the Producer of the Picture. On or around October 31, 2013, defendants also represented to plaintiffs that Legacy Point would be making a "pay or play" offer[1] to cast Robert De Niro as the lead actor in the Picture. The offer was not made. Ultimately, plaintiff Embry called Legacy Point directly and was told that there would be no "pay or play" offer and that Legacy Point needed to raise finances first. As a result, plaintiffs attempted to terminate the agreement. While Legacy Point agreed to the termination, the defendants refused. Plaintiffs commenced this lawsuit for fraud, negligent misrepresentation and declaratory relief against Solar Filmworks, LLC and Julian Adams, but not Legacy Point.

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[1] In filmmaking, a guarantee is a term of an actor, director, or other participant's contract that guarantees remuneration if, through no fault of their own, the participant is released from the contract. (Wikipedia)

It is undisputed that the individual defendants are not citizens of the state of New York. It is also undisputed that the corporate defendant is organized and incorporated under the state of South Carolina.

The plaintiffs argue that this court has personal jurisdiction over defendants because (1) defendants made false representations to plaintiff via **telephone calls** and **email** correspondence to plaintiffs who reside in New York, (2) the Picture at issue was to be produced and possibly filmed in New York, and (3) plaintiffs have been injured in New York.

Defendants argue, citing to their affidavits, that they have no contacts with New York other than interactions with a casting director who had been contracted by defendants and who happen to have an office in New York.

Discussion

Solar Filmworks, LLC

As an initial matter, the court is deciding this motion to dismiss as brought by defendants Julian Adams and David Winter. The court is not deciding this action brought by Solar Filmworks, LLC as it is currently not being represented by counsel. CPLR 321(a) states that "[a] party...may prosecute or defend a civil action in person or by attorney, except that a corporation or voluntary association shall appear by attorney". In 130 Cedar St. Corp. v. Court Press, 267 A.D. 194 (1st Dep't, 1943), the First Department held that "by statute a corporation is now

conclusively prohibited from appearing in a court of law and rendering any legal services therein for anyone, even for itself." See also Mail Boxes Etc. USA, Inc. v. Higgins, 281 A.D.2d 176 (1st Dep't, 2001) (holding that corporations are required to appear by attorney, or face default). Therefore, to proceed in this action, Solar Filmworks, LLC needs to appear by counsel[2].

CPLR 302(a) (2) Personal Jurisdiction

CPLR 302(a) (2) provides that a court may exercise the long-arm statute against a "non-domiciliary...who in person or through an agent...commits a tortious act within the state."

The courts in New York hold that the tortious act must have occurred in New York. Small v. Lorillard Tobacco Co., Inc., 252 A.D.2d 1 (1st Dep't 1998). The emphasis should be the locus of the tort. Banco Nacional Ultramarino, S.A. v. Chan, 169 Misc. 2d 182, 188 (Sup. Ct. 1996) aff'd sub nom. Banco Nacional Ultramarino, S.A. v. Moneycenter Trust Co., 240 A.D.2d 253 (1st Dep't 1997). Once the court finds that the tort occurred *within* the state, it should look at the totality of the circumstances, to determine if jurisdiction should be exercised under CPLR 302(a) (2). Id. The law is clear that, under the circumstances disclosed herein, the burden of proving jurisdiction is upon the party who asserts it. Lamarr v. Klein, 35 A.D.2d 248, 250 (1st Dep't 1970).

[2] See Decision and Order in Motion Sequence 003.

Plaintiffs allege in their opposition that: (1) plaintiffs McCracken and Randall were residents in New York; (2) plaintiff McCracken executed the agreement in New York; (3) emails and calls were made to the plaintiffs in New York; (4) plaintiffs had meetings with executive and line producers in New York; and (5) a New York based casting director was engaged to negotiate the "pay or play" deal. As for the emails and calls made to plaintiffs, plaintiffs allege that defendants falsely promised them that (i) they could and did secure immediate financing for the production of the Picture from Legacy Point Entertainment LLC and (ii) had the resources to make a "pay or play" offer to Creative Artist Agency (CAA) for Robert De Niro to play a lead role in the Picture.

We address plaintiffs' allegations separately. First, plaintiffs allege that they were residents of New York and that the emails and calls containing alleged fraudulent misrepresentations were made to them in New York. CPLR 302(a) (2) has been narrowly construed to apply only when the *defendant's* wrongful conduct is performed in New York. The defining case is Feathers v. McLucas, 15 N.Y. 2d 443, 448 (1965). In Feathers, the defendant manufactured a steel tank in Kansas and sold it to a Missouri company with knowledge that the tank would be mounted on a wheelbase and resold to a Pennsylvania company for the interstate transportation of propane gas. The tank exploded on a New York highway, injuring the plaintiffs. The Court of Appeals rejected the applicability of CPLR 302(a) (2)

because the tortious act--defendant's negligent manufacturing of the tank--occurred in Kansas, not New York. Applying a plain language analysis, the Court held that "tortious act within the state" refers to the defendant's conduct, not its injurious consequences. Without denying the constitutionality of asserting jurisdiction on the given facts, the operative phrase of CPLR 302(a) (2) was simply not "synonymous with 'commits a tortious act without the state which causes injury within the state.' See also, Kramer v. Vogl, 17 N.Y.2d 27 (1966) (where defendant made misrepresentations to plaintiff in Paris and confirmed those misrepresentations by letter mailed into New York, defendant did not commit tortious act in New York); Platt Corp. v. Platt, 17 N.Y.2d 234 (1966). Here, the plaintiffs have not claimed that the defendants were in New York when the tort was committed.

However, plaintiffs claim that the tortious statements were made to New York by defendants' emails and calls to them. Most of the New York courts have refused to apply CPLR 302(a) (2) to claims based on tortious statements that made their way to New York only by mail or telephone. For example, in Bauer Industries, Inc. v. Shannon Luminous Materials Co., 52 A.D.2d 897 (2d Dep't 1976), the court held that a California corporation and its principals were not subject to personal jurisdiction in New York in connection with a fraud action by a New York corporation which was distributing fluorescent pens manufactured by the defendants, where the defendants were not doing business or transacting

business within New York State, despite the contention that the alleged false representation, mailed to plaintiff in New York, constituted the commission of a tortious act within New York. See also, Findlay v. Duthuit, 86 A.D.2d 789, 446 N.Y.S.2d 951, 953 (1st Dept.,1982) (where defendant, in France, committed tort in the course of a phone call placed from New York to defendant, defendant did not commit a tortious act within the state); Young v. Mallet, 49 A.D.2d 528, 371 N.Y.S.2d 1, 3 (1st Dept.,1975); Stein v. Annenberg Research Institute, 1991 WL 143400, at *3 (S.D.N.Y. 1991) (One single telephone call made to New York State is insufficient contact to support a suit initiated in that forum against an out-of-state resident under either the contract or tort provisions of CPLR 302).

Moreover, it is clear that the out-of-state defendants did not have sufficient contacts with New York for the court to exercise jurisdiction under CPLR 302(a)(2). Here, it is undisputed that the defendants communicated with plaintiff McCracken by placing calls to his telephone number which had a 310 (Los Angeles) area code. (Docket No. 25, 26). Mr. McCracken even stated his home address in Connecticut as the place where he would receive all notices regarding the agreement. Id. Mr. McCracken is also registered to vote in Connecticut. Id. Moreover, defendants communicated with plaintiff Embry at her home in California. Id. Both plaintiffs filed their Writers' Guild registration and U.S. copyright application to their script specifying their residences in California and

Connecticut. Id. There is no evidence that defendants were conducting activities within New York.

Moreover, in Waggaman v. Arauzo, 117 A.D.3d 724, 726 (2nd Dep't, 2014), quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) continued, "Due process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the "random, fortuitous or attenuated" contacts he makes by interacting with other persons affiliated with the State." Here, defendants themselves do not have their own affiliation with New York. It would offend "minimum contacts" due process principles to force defendants to litigate this claim in a New York forum on the basis of telephone calls or virtual emails.

As for the allegations that *plaintiffs* had meetings with executive and line producers in New York, *plaintiff* McCracken executed the Financing Agreement in New York and the engagement of the New York based casting director to negotiate the "pay or play" deal, these do not establish personal jurisdiction. In a CPLR 302(a) (2) analysis, the relevant conduct that the court looks at to make a decision is the defendant's, not the plaintiff's. In Waggaman, 117 A.D.3d 726, the Appellate Division, citing the U.S. Supreme Court's decision in Walden v. Fiore, 134 S. Ct. 1115, 1122-23 (2014), held that a "plaintiff cannot be the only link between the defendant and the forum. Rather it is the defendant's conduct that

must form the necessary connection with the forum State that is the basis for its jurisdiction over him."

Therefore, plaintiffs fail to set forth a prima facie basis for jurisdiction over defendants under CPLR 302(a) (2).

CPLR 302(a) (3) Personal Jurisdiction

Plaintiffs are also claiming that they were injured in New York. Notably, CPLR 302(a) (3)[3] was adopted in response to the Feathers case.

Plaintiffs allege that they lost their credibility within the New York film industry and now have significantly less leverage in New York to produce the film.

However, CPLR 302(a) (3) specifically requires that the plaintiff prove that defendant (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce. These allegations have not been made by plaintiffs.

[3] As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent - commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

Therefore, plaintiffs fail to set forth a prima facie basis for jurisdiction over defendants under CPLR 302(a) (3).

Contract claims cannot be recast as tort claims under a CPLR 302(a) (2) or (3) analysis

The Complaint alleges that the "first of many representations" that were later found to be untrue was made "in or around May 2013". Since the Financing Agreement was signed on June 13, 2013, the alleged torts were committed one month before the signing of the agreement.

By way of *obiter dicta*, given that the plaintiffs signed the agreement and it is the agreement which governs the relationship of the parties (including the defendants), the cause of action that may be more suited for this action is a breach of contract claim. However, plaintiffs may not transform a breach of contract into a tort for jurisdictional purposes to obtain jurisdiction under New York's long arm statute. See e.g., Trafalgar Capital Corp. v. Oil Producers Equipment Corp., 555 F. Supp. 305, 310 (S.D.N.Y. 1983); Amigo Foods Corp. v. Marine Midland Bank-New York, 39 N.Y.2d 391(1976) (breach of contract is not a tortious act for CPLR 302(a)(2) purposes).

Jurisdictional Discovery

In order to obtain jurisdictional discovery, plaintiffs must make a "sufficient start" demonstrating that long-arm jurisdiction may exist over defendants. See

American BankNote Corp. v. Daniele, 45 A.D 3d 338, 340 [1st Dep't., 2007] (holding that plaintiff's pleadings and affidavits alleging that the non-domicile defendants used their New York bank accounts to further their misdeeds, contracted to provide goods for New York clients, and traveled to New York for business was a sufficient start to warrant jurisdictional discovery). The court ultimately has the discretion to grant jurisdictional discovery, but plaintiffs must still make a threshold showing that there is some basis for jurisdiction. See, Royalty Network v. Dishant.com, 638 F.Supp.2d 410, 425 (S.D.N.Y. 2009).

Here, the plaintiffs have not made a threshold showing that there is some basis for jurisdiction. Apart from the telephone calls and email correspondence as discussed above, plaintiffs have not asserted other contacts that defendants had with New York.

As such, plaintiffs have not made a sufficient start demonstrating that long-arm jurisdiction exist over defendants and therefore, plaintiffs' request is denied.

Absence of a Necessary Party and Forum Non Conveniens

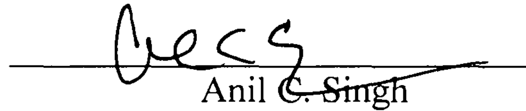
Defendants have also moved to dismiss the Complaint for absence of a necessary party and forum non conveniens. Since the court has determined that the action is not jurisdictionally sound, these issues are moot.

ORDERED that defendant Solar Filmworks, LLC's motion to dismiss is denied without prejudice, with leave to renew by appearance of counsel; and it is further

ORDERED that defendants Julian Adams' and David Winter's motion to dismiss the Complaint for lack of personal jurisdiction is granted, with prejudice as to Julian Adams and David Winter; and it is further

ORDERED that plaintiffs' request for jurisdictional discovery is denied.

Date: March 22, 2016
New York, New York



Anil C. Singh