

Allied Intl. Fund, Inc. v Gladtko
2016 NY Slip Op 31702(U)
August 4, 2016
Supreme Court, New York County
Docket Number: 650029/2016
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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ALLIED INTERNATIONAL FUND, INC.,

Index No.: 650029/2016

Plaintiff,

DECISION & ORDER

-against-

JOSHUA GLADTKE,

Defendant.

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SHIRLEY WERNER KORNREICH, J.:

Plaintiff Allied International Fund, Inc. (AIF) moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint against defendant Joshua Gladtkke. Gladtkke opposes the motion on the merits and seeks dismissal for lack of personal jurisdiction. For the reasons that follow, plaintiff's motion is denied and the action is dismissed for lack of personal jurisdiction.

I. Factual Background & Procedural History

The facts material to this decision are straightforward and not in dispute.¹ While living and working in London² for a UK-based broker dealer, ArJent Ltd. (ArJent),³ Gladtkke executed a

¹ There are myriad disputed facts that may or may not be material to liability, but the court will not delve too deeply into the merits given the clear lack of personal jurisdiction. References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

² Gladtkke resides in New Jersey, where he owns a home. He moved to London in 2002 and worked there until 2010. *See* Dkt. 14 at 2. Between October 2010 and early 2015, he lived in apartments in Manhattan, at which point he moved back to his New Jersey home. *See id.* He currently works for another company with an office in Manhattan, but claims to be on the road for most of the month. *See id.* at 11.

³ AIF and ArJent are controlled by non-party Robert DePalo, who, like Gladtkke, is the subject of criminal and civil securities fraud proceedings related to the sale of more than \$6 million in securities through ArJent. *See* Dkt. 22 (*SEC v DePalo*, 15-cv-38771 (SDNY)); *see also* Dkt. 20 (*People v DePalo*, Index No. 1450/2015 (Sup Ct, NY County)). While Gladtkke was involved, according to the SEC and the District Attorney, "DePalo was at the center of the fraudulent scheme," which he perpetrated, due to ArJent's near insolvency, to "maintain his extravagant lifestyle." *See* Dkt. 22 at 2; *see also* Dkt. 20 at 1.

Promissory Note for \$541,716.81 in favor of AIF. *See* Dkt. 3 (the Note). The Note had a maturity date of March 29, 2007 and carried 7% annual interest. Section 2.1 of the Note states that AIF's "**sole recourse hereunder is to the security recited in Section 5 hereof.**" *See id.* at 2 (bold in original). Section 5 provides that the Note is secured by shares of ArJent stock owned by Gladtkke (the Stock). *See id.* at 4. Section 3.2 further provides that "[a]ll bonuses and commissions payable by [ArJent to Gladtkke] while this Note is outstanding shall be delivered to AIF and applied to prepayment of principal and interest hereunder." *See id.* at 3. Hence, the Note was a non-recourse obligation secured only by Gladtkke's bonuses, commissions, and his Stock. Though the Note was executed in England, it is governed by New York law. The Note does not contain a forum selection clause or a consent to jurisdiction. *See id.* at 4.

Gladtkke also signed a confession of judgment prepared by AIF, which falsely indicates it was executed in Kings County, New York. *See* Dkt. 4 (the COJ). It was executed in London. The COJ states that AIF is entitled to judgment "foreclosing on the [Stock] owned by [Gladtkke] (but not his base salary) **and not against [Gladtkke] personally.**" *See id.* at 2 (bold added; words in parenthesis, as opposed to brackets, in original).⁴

⁴ While the court is not reaching the merits due to lack of jurisdiction, AIF and its counsel are cautioned about the apparent frivolity of this case given the non-recourse nature of the Note and the clear unenforceability of the COJ, which is not notarized and only covers the Stock and not the principal amount. CPLR 3218(a) requires a confession of judgment to be in the form of an affidavit. *See McDaniel v Sangenino*, 67 AD2d 698, 699 (2d Dept 1979) (confession of judgment not executed under oath is invalid). Affidavits, generally, must be notarized [*see Slavenburg Corp. v Opus Apparel, Inc.*, 53 NY2d 799, 801 (1981)], and AIF does not contend that an affirmation was permissible here. *See* CPLR 2106. The confession of judgment actually has a line for a notary to sign, and that line is blank. *See* Dkt. 4 at 2. Even assuming the January 1, 2015 amended version of CPLR 2106(b) applies to a 2007 confession of judgment, its requirements are not met because the COJ lacks the required language. *See id.* ("I affirm this ... day of,, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that I am physically located outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States, that the foregoing is true, and I

On January 5, 2016, AIF commenced this action by filing a summons and the instant motion for summary judgment in lieu of complaint. On January 21, 2016, Gladtko was served in New Jersey. *See* Dkt. 11. On March 18, 2016, he opposed the motion on multiple grounds, including lack of personal jurisdiction. The court reserved on the motion after oral argument. *See* Dkt. 29 (6/30/16 Tr.).

A motion for summary judgment in lieu of complaint under CPLR 3213 is an appropriate vehicle to enforce an instrument for the payment of money only. *Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro*, 25 NY3d 485, 491 (2015). “To establish prima facie entitlement to summary judgment in lieu of complaint, a plaintiff must show the existence of a promissory note executed by the defendant containing an unequivocal and unconditional obligation to repay and the failure of the defendant to pay in accordance with the note’s terms.” *Zyskind v FaceCake Marketing Techs., Inc.*, 101 AD3d 550, 551 (1st Dept 2012). However, as with all actions, a proceeding under CPLR 3213 may not be maintained without personal jurisdiction over the defendant. *See Segway of N.Y., Inc. v Udit Group, Inc.*, 120 AD3d 789, 792 (2d Dept 2014) (judgment in action commenced under CPLR 3213 vacated for lack of personal jurisdiction).

Here, since Gladtko lives in New Jersey and was served in New Jersey, the only possible basis for asserting jurisdiction is long-arm jurisdiction under CPLR 302(a)(1), which provides for jurisdiction over a nondomiciliary who in person or through an agent “transacts any business within the state.” *See Johnson v Ward*, 4 NY3d 516, 519 (2005). CPLR 302(a)(1) “is a ‘single

understand that this document may be filed in an action or proceeding in a court of law.”) AIF’s counsel also is cautioned regarding his statements to the court. In his reply affidavit he claimed that, in the COJ, Gladtko “specifically consented to jurisdiction in this Court.” *See* Dkt. 26 at 2. Again, the COJ only consented to the entry of judgment with respect to the Shares. It is unacceptably deceptive for counsel to suggest otherwise, particularly since any attempt to enter the un-notarized COJ would be frivolous.

act statute' and 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." *Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 (1988); see also *Paterno v Laser Spine Institute*, 24 NY3d 370, 376 (2014) ("The lack of an in-state physical presence is not dispositive of the question whether a non-domiciliary is transacting business in New York"). However, "[e]ven if a defendant has engaged in purposeful acts in New York, there must also exist a substantial relationship between those particular acts and the transaction giving rise to the plaintiff's cause of action." *Pramer S.C.A. v Abaplus Int'l Corp.*, 76 AD3d 89, 95 (1st Dept 2010), citing *McGowan v Smith*, 52 NY2d 268, 272 (1981). The mere deposit of funds into New York does not satisfy this requirement and "is insufficient to invoke personal jurisdiction." *DirectTV Latin Am., LLC v Pratola*, 94 AD3d 628, 629 (1st Dept 2012), citing *Pramer*, 76 AD3d at 96. Indeed, "an out-of-state note made payable in New York does not, in and of itself, confer personal jurisdiction over the non-domiciliary" because "New York may not extend long-arm jurisdiction over a non-domiciliary who was never physically present in New York, and who never agreed to provide any goods or services here, other than a promise to a New York corporation that he would make good if a corporation of another state defaulted on its debt." *First Nat'l Bank & Trust Co. v Wilson*, 171 AD2d 616, 618 (1st Dept 1991); see also *Shalik v Coleman*, 111 AD3d 816, 818 (2d Dept 2013) ("The only connections that the appellant has with New York are that the promissory note provides that it should be governed and construed in accordance with the laws of New York, that there were communications made between the appellant and the plaintiff via telephone and email, and that the appellant mailed payments due

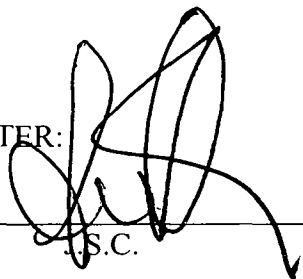
on the note to the plaintiff's office in New York. These contacts are insufficient to support jurisdiction under CPLR 302(a)(1)").

Under this authority, where, as here, Gladtko executed the Note while living and working in England, and since he was not served in New York, this action must be dismissed for lack of personal jurisdiction. The Note was not part of a transaction with any meaningful nexus to New York, and the collateral, AIF's only recourse for enforcing the Note, was shares in a foreign company.⁵ Accordingly, it is

ORDERED that the motion by plaintiff Allied International Fund, Inc. for summary judgment in lieu of complaint against defendant Joshua Gladtko is denied, this action is dismissed for lack of personal jurisdiction, and the Clerk is directed to enter judgment accordingly.

Dated: August 4, 2016

ENTER:



J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C

⁵ The court will not *sua sponte* grant sanctions against AIL or its counsel on this motion, but sanctions may well be appropriate if this action is refiled on the basis of general jurisdiction with proper New York service if no non-frivolous basis to seek a claim for monetary damages is asserted or if AIF seeks to enter the un-notarized confession of judgment.