McCracken v Adams
2016 NY Slip Op 31936(U)
October 11, 2016
Supreme Court, New York County
Docket Number: 652606/2016
Judge: Anil C. Singh

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,

-against-

Julian Adams, Solar Filmworks, LLC and David Winter,

Defendants.

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DECISION AND ORDER

Index No. 652606/2016

Mot. Seq. 004

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 ("SFW"), and David Winter (collectively, "Defendants").[1] Defendant Solar Filmworks, LLC moves to dismiss claims on the grounds that the action is a nullity as it was brought by an out-of-state attorney without a physical office in New York State in violation of Judiciary Law 470; plaintiffs failed to effect proper service on SFW, and that the Court lacks personal jurisdiction over SFW. Defendants oppose on all three grounds.

Facts

[1] The action was previously dismissed against the individual defendants for lack of personal jurisdiction. See Decision and Order dated March 22, 2016.

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. In or around May 2013, Defendants approached plaintiffs and allegedly represented to Plaintiffs 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 ("the 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 section 1 of the Agreement, Legacy Point is obligated 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[2] to cast Robert De Niro as the lead actor in the Picture. The offer was allegedly never 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

[2] 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.

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.

Discussion[3]

Improper Service

SFW argues that Plaintiffs failed to effectuate proper service because they did not comply with Liability Law § 304(2)(e). Liability Law § 304 for service of process on unauthorized foreign limited liability companies requires service on the Secretary of State and if notice and a copy of the process is sent via registered mail, return receipt requested. Proper proof of service "shall be by affidavit of compliance with this section filed, together with the process, within thirty days after receipt of the return receipt signed by the foreign limited liability company or other official proof of delivery or of the original envelope mailed." NY Limit Liab Co § 304(2)(e).

[3] As an initial matter, Defendant SFW's move to dismiss the complaint on the grounds that action is a nullity because it was commenced by the filling of a Summons and Complaint dated July 24, 2015 by an out-of-state attorney without a physical office in New York State in violation of Judiciary Law § 470. While the law in the First Department is clear and unambiguous that failure to maintain a local office requires dismissal of the action without prejudice, see Webb v. Greater New York Auto. Dealers Ass'n, Inc., 93 A.D.3d 561, 940 N.Y.S.2d 608 (2012); Kinder Morgan Energy Partners, LP v Ace Am. Ins. Co., 51 AD3d 580 [2008]; Empire Healthchoice Assur., Inc. v. Lester, 81 A.D.3d 570, 571, 918 N.Y.S.2d 68 (2011), Plaintiffs appear to have retained local counsel and have corrected the issue. As such, the action is not a nullity, and is not dismissed on these grounds.

Plaintiffs did serve the Secretary of State and mail the amended complaint via registered mail, return receipt requested on October 16, 2015.[4] Plaintiffs then filed a proof of service with this Court on November 12, 2015. The proof of service included an affidavit of the process server who served the Secretary of State in Albany, the receipt for service in Albany, a proof of service by mail on SFW, a California All-Purpose Acknowledgment, a receipt that shows they purchased return receipt requested, and finally, a copy of the receipt for registered mail. However, Plaintiffs failed to include a receipt signed by the foreign LLC, other proof of delivery, or of the original envelope mailed.

Strict compliance, "including the requirements pertaining to the filing of an affidavit of compliance, is required to validly effect service of process on an unauthorized foreign corporation." Elzofri v. Am. Express Co., 29 Misc. 3d 898, 900, 907 N.Y.S.2d 644, 646–47 (Sup. Ct. 2010). Thus, Plaintiffs failed to properly comply with Limited Liability Law § 304(2)(e). As such, the action is dismissed.

CPLR 302(a) (3) Personal Jurisdiction

SFW's motion to dismiss for lack of personal jurisdiction is granted. 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). Plaintiffs' allegations must amount to more than

[4] SFW argues that Plaintiffs attempted service on the wrong address on October 1, 2015, and thus, has improperly effected service. However, this argument is moot because Plaintiffs sent a second mailing to the undisputed, correct address on file for SFW.

simply conclusory statements. Cotia (USA) Ltd. v. Lynn Steel Corp., 134 A.D.3d 483, 485, 21 N.Y.S.3d 231, 233 (1st Dep't 2015). Plaintiffs claim that they have made a *prima facie* showing that SFW is subject to personal jurisdiction in New York under CPLR 302(a)(3).[5]

Plaintiffs are claiming that they were injured in New York. 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) also 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.

Plaintiffs allege that SFW was regularly doing business and soliciting business in New York by actively marketing, promoting, and commercially exploiting the film *Phantom*, that it had produced, around New York. Plaintiffs

[5] 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. See CPLR 302(a) (3).

further allege that SFW received substantial revenue from the distribution of the motion picture *Phantom*.[6]

The film industry since the Supreme Court's ruling in United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948) has possessed a hard line separation between production and distribution/exhibition. Notably, the First Amended Complaint nowhere asserts that Defendant SFW distributed the film. Defendant SFW asserts that SFW transferred all rights to the distribution of *Phantom* to RCR Distribution. The separation required for over half a century by the Supreme Court between production and distribution companies means that SFW, after selling the rights to *Phantom* had no interest in *Phantom*. Thus, SFW would not have been involved in the distribution and exhibition of the film in New York. Aside from statements about substantial revenue derived from *Phantom* which as stated above cannot have occurred, Plaintiffs have made nothing but conclusory allegations that SFW has regularly engaged in business in New York, which does not satisfy the long arm statute. Cotia (USA) Ltd., 134 A.D.3d at 485.

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

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

[6] They also mention that it was reviewed and promoted by New York publications, but the Court does not find this evidence of actions taken by SFW.

By way of *obiter dicta*, in the order on motion sequence 002, the Court stated that "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." The Court has not changed its opinion, and reiterates that 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). However, the Court has already dismissed the action on other grounds, so this issue is moot.

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 required separation between the production and exhibition of films bars that SFW's involvement in *Phantom* could lead to sufficient contacts in New York. As such, plaintiffs have not sufficiently demonstrated that long-arm jurisdiction exist over Defendant SFW and therefore, plaintiffs' request is denied.

Accordingly, it is hereby

ORDERED that defendant Solar Filmworks, LLC's motion to dismiss based on lack of personal jurisdiction is granted.

Date: October 11 , 2016
New York, New York

Anil C. Singh