

**Homeland Found., Inc. v Duke Univ.**

2017 NY Slip Op 30462(U)

March 3, 2017

Supreme Court, New York County

Docket Number: 651140/16

Judge: Ellen M. Coin

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY - - PART 63

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HOMELAND FOUNDATION, INC.,

Plaintiff,

- against -

DUKE UNIVERSITY, DUKE UNIVERSITY  
LEGACY FUND and WYCKHOFF HOUSE &  
ASSOCIATION, INC.,

Defendants.

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Index No.: 651140/16

DECISION/ORDER

**COIN, ELLEN, J.:**

In this action, plaintiff Homeland Foundation, Inc. (Homeland or the foundation) sues to recover money allegedly improperly transferred to defendants by former trustees of the foundation. The complaint alleges causes of action for unjust enrichment, money had and received, and a constructive trust. Defendants Duke University and Duke University Legacy Fund (together, Duke) move to dismiss the complaint pursuant to CPLR 3211 (a) (8) for lack of personal jurisdiction.

Background

Homeland is a New York charitable foundation, with its principal office located in New York, New York, established in 1938 to maintain and preserve an estate in Amenia, New York, and for certain other charitable purposes. Duke University is a non-profit research and educational institution, organized under the laws of North Carolina, with its offices and principal place of business in Durham County, North Carolina. Duke University Legacy Fund (Legacy Fund) raises money to support the Duke

University basketball program. It is, according to Duke's Associate University Counsel, Ralph McCaughan (McCaughan), a part of Duke University, not a separate legal entity, which plaintiff does not refute. See Affidavit of Ralph McCaughan in Support of Defendant's Motion (McCaughan Aff.), ¶ 8. Defendant Wyckoff House and Association, Inc., a New York corporation, with its principal office located in Brooklyn, New York, is associated with the late Lisk Wyckoff (Wyckoff), former President of Homeland and an alumnus of Duke University.<sup>1</sup>

Duke University recruits and accepts students from almost all states, including New York, and about 8 percent of its undergraduate students are New York residents. *Id.*, ¶ 4. Duke has no campus, office, or store, and owns no real property and leases no office space, in New York. *Id.*, ¶¶ 9, 10. It is neither incorporated nor registered to do business in New York and pays no payroll or property taxes in New York. *Id.*, ¶¶ 12, 13, 15. It does offer its students three semester-long "global education" programs in New York, in conjunction with New York University, as well as volunteer programs in New York; and sends various athletic teams to compete in New York. *Id.*, ¶¶ 18, 19. It maintains contact with an alumni association in New York, and raises a substantial amount of money from New York alumni. *Id.*,

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<sup>1</sup>Defendant Wyckoff House & Association, Inc. has submitted no opposition or other papers in response to Duke's motion.

¶ 20; see generally *Thackurdeen v Duke Univ.*, 130 F Supp 3d 792, 796 (SD NY 2015), *affd* 660 Fed Appx 43 (2d Cir 2016). Duke also is registered with the New York State Attorney General's Charities Bureau for the purpose of soliciting contributions in New York. McCaughan Aff., ¶ 17; see Registration Statement, Ex. A to Affirmation of Damien Albergo in Opposition to Duke's Motion (Albergo Aff.).

In September 2015, following an investigation by the New York State Attorney General into the administration and distribution of the foundation's funds by former trustees of Homeland, an Assurance of Discontinuance (Assurance) was entered into by the Attorney General and the former trustees. See Assurance, Ex. A to Affidavit of Thomas Donahoe in Opposition to Defendant's Motion (Donahoe Aff.). The former trustees included Wyckoff, who died in November 2012, and his wife, Elizabeth Wyckoff, who succeeded her husband as Homeland's President.

The Assurance set out findings of the Attorney General's investigation that the former trustees had improperly disbursed assets of the Homeland Fund (the fund) in violation of their legal duties and the express terms of the fund, causing a substantial drop in the value of the foundation's assets. *Id.*, ¶¶ 2,3. The Attorney General found that the former trustees' grants were often tainted by conflicts of interest, noting as examples, awards of \$875,000 to Wyckoff House and almost \$3

million to Duke. *Id.*, ¶ 19. Pursuant to the terms of the Assurance, the former trustees agreed to repay approximately \$4.4 million to the foundation. *Id.*, ¶¶ 36-37.

According to documents submitted by plaintiff, Homeland's donations to Duke included money to fund two professorships and to support an art exhibit. Donahoe Aff., ¶¶ 18, 19, 22; see Exs. B, F, J to Donahoe Aff. In or around December 2007, Homeland pledged to give Duke \$2 million to fund the Associate Basketball Coach Fund (Coach Fund), and made a \$500,000 payment at that time. Donahoe Aff., ¶ 17; see Gift History & Schedule, Ex. R to Donahoe Aff. Homeland made additional payments to the Coach Fund of \$300,000 and \$100,000 in, respectively, May 2008 and June 2009, and made the \$300,000 payment at issue in this case in March 2010, paying a total of \$1.2 million of the original \$2 million pledge. *Id.*

Homeland commenced this action in March 2016, seeking to recover \$300,000 paid to Duke in March 2010, and \$21,000 paid to Wyckoff House. As plaintiff acknowledges, due to the statute of limitations, it cannot seek to recover payments made prior to March 2010. See Plaintiff's Memorandum of Law in Opposition (P. Memo), at 1. Duke moves to dismiss the complaint as against it, on the grounds that Homeland cannot establish that New York has either general or specific personal jurisdiction over Duke.

#### Personal Jurisdiction

In New York, personal jurisdiction may be based on general jurisdiction (see CPLR 301), or specific, or long-arm, jurisdiction (see CPLR 302). A nonresident defendant "is amenable to suit in New York courts under CPLR 301 if it has engaged in such a continuous and systematic course of 'doing business' here that a finding of its 'presence' in this jurisdiction is warranted." *Landoil Resources Corp. v Alexander & Alexander Servs.*, 77 NY2d 28, 33 (1990) (citations omitted); see *McGowan v Smith*, 52 NY2d 268, 272 (1981); *Fernandez v DaimlerChrysler, AG.*, 143 AD3d 765, 766 (2d Dept 2016). As a matter of due process, general jurisdiction exists only if the defendant's "'affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State.'" *Daimler AG v Bauman*, 571 US \_\_\_, 134 S Ct 746, 761 (2014), quoting *Goodyear Dunlop Tires Operations, S.A. v Brown*, 564 US 915, 919 (2011); see *Motorola v Standard Bank*, 24 NY3d 149, 161 n 4 (2014). Following *Daimler*, New York courts have held that there is no general jurisdiction where defendant "is not incorporated in New York and does not have its principal place of business in New York." *Magdalena v Lins*, 123 AD3d 600, 601 (1<sup>st</sup> Dept 2014); see *D&R Global Selections, S.L. v Bodega Olegario Falcon Piñeiro*, 128 AD3d 486, 487 (1<sup>st</sup> Dept 2015); *Sustainable Pte. Ltd. v Peak Venture Partners LLC*, 2017 WL 413173, 2017 NY Misc LEXIS 331, \*12, 2017 NY Slip Op 30202(U)

(Sup Ct, NY County 2017). “[G]eneral, or all-purpose, jurisdiction allow[s] a court to hear any and all claims against a foreign corporation.” *Matter of B&M Kingstone, LLC v Mega Intl. Commercial Bank Co.*, 131 AD3d 259, 264 (1<sup>st</sup> Dept 2015), citing *Daimler*, 134 S Ct at 751.

Specific or long-arm jurisdiction, in contrast, “is confined to adjudication of ‘issues deriving from, or connected with, the very controversy that establishes jurisdiction.’” *Goodyear*, 564 US at 919. Under CPLR 302 (a) (1), a court may exercise personal jurisdiction over a nondomiciliary defendant who “transacts any business within the state.” “The CPLR 302 (a) (1) jurisdictional inquiry is twofold: under the first prong the defendant must have conducted sufficient activities to have transacted business in the state, and under the second prong, the claims must arise from the transactions.” *Rushaid v Pictet & Cie*, 28 NY3d 316, 323 (2016); see *Licci v Lebanese Can. Bank, SAL*, 20 NY3d 327, 334 (2012); *Fischbarg v Doucet*, 9 NY3d 375, 380 (2007); *Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71, cert denied 549 US 1095 (2006). “In effect, the ‘arise-from’ prong limits the broader ‘transaction-of-business’ prong to confer jurisdiction only over those claims in some way arguably connected to the transaction.” *Licci*, 20 NY3d at 339-40; see *Wilson v Dantas*, 128 AD3d 176, 182 (1<sup>st</sup> Dept 2015). “If either prong of the statute is not met, jurisdiction cannot be conferred.” *Johnson v Ward*, 4

NY3d 516, 519 (2005).

To satisfy the "transacting business" prong, "there must have been some 'purposeful activities' within the State that would justify bringing the nondomiciliary defendant before the New York courts." *McGowan*, 52 NY2d at 271 (citations omitted); see *Fischbarg*, 9 NY3d at 380; *Deutsche Bank Sec., Inc.*, 7 NY3d at 71. "Purposeful activities are 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.'" *Fischbarg*, 9 NY3d at 380 (citations omitted); see *Rushaid*, 28 NY3d at 323; *America/Intl. 1994 Venture v Mau*, 146 AD3d 40, 52 (2d Dept 2016); see also *Ehrenfeld v Bin Mahfouz*, 9 NY3d 501, 508 (2007) ("'[t]he overriding criterion' necessary to establish a transaction of business is 'some act by which the defendant purposefully avails itself of the privilege of conducting activities within [New York]'" [citations omitted]).

"[E]ven when physical presence is lacking, jurisdiction may still be proper if the defendant 'on his [or her] own initiative . . . project[s] himself [or herself]' into this state to engage in a 'sustained and substantial transaction of business.'" *Fischbarg*, 9 NY3d at 382, quoting *Parke-Bernet Galleries v Franklyn*, 26 NY2d 13, 18 (1970); see *Paterno v Laser Spine Inst.*, 24 NY3d 370, 377 (2014). "'So long as a party avails itself of

the benefits of the forum, has sufficient minimum contacts with it, and should reasonably expect to defend its actions there, due process is not offended if that party is subjected to jurisdiction even if not "present" in that State.'" *Deutsche Bank*, 7 NY3d at 71, quoting *Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 466 (1988); see also *Ehrenfeld*, 9 NY3d at 508.

Determining whether a defendant transacts business in New York "requires an examination of the totality of the circumstances.'" *American/Intl. 1994 Venture*, 146 AD3d at 52 (citation omitted); see *Pincione v D'Alfonso*, 506 Fed Appx 22, 24-25 (2d Cir 2012). "Although it is impossible to precisely fix those acts that constitute a transaction of business, our precedents establish that it is the quality of the defendants' New York contacts that is the primary consideration. *Fischbarg*, 9 NY3d at 380; see *Licci*, 20 NY3d at 338. While "[m]ore than limited contacts are required . . . to establish that the non-domiciliary transacted business in New York" (*Paterno*, 24 NY3d at 376), "it is not the quantity but the quality of the contacts that matters under our long-arm jurisdiction analysis." *Id.* at 378.

Courts "have interpreted the second prong of the jurisdictional inquiry to require that, in light of all the circumstances, there must be an 'articulable nexus' or 'substantial relationship' between the business transaction and

the claim asserted." *Licci*, 20 NY3d at 339, quoting *McGowan*, 52 NY2d at 272 and *Kreutter*, 71 NY2d at 467. "This inquiry is 'relatively permissive,' and does not require causation, but merely 'a relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former, regardless of the ultimate merits of the claim.'" *Rushaid*, 28 NY3d at 329, quoting *Licci*, 20 NY3d at 339; see *McGowan*, 52 NY2d at 272; *Kreutter*, 71 NY2d at 467. "The claim need only be 'in some way arguably connected to the transaction'" (*Rushaid*, 28 NY3d at 329 [citation omitted]), and more than "'merely coincidental' with it." *Licci*, 20 NY3d at 340, citing *Johnson*, 4 NY3d at 520; see *Fischbarg*, 9 NY3d at 384.

"As the party seeking to assert personal jurisdiction, the plaintiff bears the ultimate burden of proof on this issue." *Marist Coll. v Brady*, 84 AD3d 1322, 1322-1323 (2d Dept 2011); see *Carrs v Avco Corp.*, 124 AD3d 710, 710 (2d Dept 2015); *Copp v Ramirez*, 62 AD3d 23, 28 (1<sup>st</sup> Dept 2009). "However, to defeat a CPLR 3211 (a) (8) motion to dismiss, a plaintiff need only establish, prima facie, that the defendant was subject to the personal jurisdiction of the Supreme Court " *Carrs*, 124 AD3d at 710; see *Chen v Guo Liang Lu*, 144 AD3d 735, 736 (2d Dept 2016); *Doe v McCormack*, 100 AD3d 684, 684 (2d Dept 2012); *Cornely v Dynamic HVAC Supply, LLC*, 44 AD3d 986 (2d Dept 2007). "[I]n deciding whether the plaintiffs have met their burden, the court

must construe the pleadings and affidavits in the light most favorable to them and resolve all doubts in their favor." *Brandt v Toraby*, 273 AD2d 429, 430 (2d Dept 2000); see *CutCo Indus., Inc. v Naughton*, 806 F2d 361, 365 (2d Cir 1986).

Further, in opposing a CPLR 3211 (a) (8) motion to dismiss on the ground that discovery is needed, a plaintiff need not make a prima facie showing of jurisdiction, but need only make a "sufficient start" in establishing jurisdiction and show its "position not to be frivolous," so as to warrant an opportunity to conduct discovery on the jurisdictional issue. *Peterson v Spartan Indus., Inc.*, 33 NY2d 463, 467 (1974); see *Amigo Foods Corp. v Marine Midland Bank-N.Y.*, 39 NY2d 391, 395 (1976); *Expert Sewer & Drain, LLC v New England Mun. Equip. Co.*, 106 AD3d 775, 776 (2d Dept 2013); *American BankNote Corp. v Daniele*, 45 AD3d 338, 340 (1<sup>st</sup> Dept 2007). To that end, "plaintiffs must demonstrate the possible existence of essential jurisdictional facts that are not yet known." *Copp*, 62 AD3d at 31. That is, "[t]he opposing party need only demonstrate that facts 'may exist' whereby to defeat the motion. It need not be demonstrated that they do exist." *Peterson*, 33 NY2d at 466.

#### Application

At the outset, plaintiff has failed to demonstrate that Duke is subject to the general jurisdiction of this court. To support jurisdiction under CPLR 301, Duke's activities must be such that

they support a finding that it is present "with a fair measure of permanence and continuity." *Landoil Resources Corp.*, 77 NY2d at 34; see *McGowan*, 52 NY2d at 272; *Weil v American Univ.*, 2008 WL 126604, \*4, 2008 US Dist LEXIS 1727, \*9 (SD NY 2008). As Duke correctly argues, its affiliations with New York are not "so continuous and systematic as to render [it] essentially at home" here. *Daimler*, 134 S Ct at 754. Duke is not incorporated in New York and does not have its principal place of business in New York, and its activities in New York otherwise do not demonstrate that it is doing business in New York for purposes of general jurisdiction. See *Thackurdeen*, 660 Fed Appx at 45; see also *D&R Global Selections, S.L.*, 128 AD3d at 487; *Magdalena*, 123 AD3d at 601.

Plaintiff does not seriously contest this. Although, in its opposition papers, plaintiff sets out arguments for both specific and general jurisdiction, it acknowledges that the "crux" of the matter is whether Duke is subject to specific personal jurisdiction. See P. Memo at 16. Moreover, at oral argument on the motion, counsel for plaintiff conceded that there is no general jurisdiction over Duke. At issue, then, is whether Duke is subject to specific, long-arm jurisdiction in New York under CPLR 302 (a) (1).

Duke does not dispute that it recruits and admits students from New York, sends athletic teams to play in New York, offers

three semester-long educational programs in New York, has a program for students to do volunteer work in New York, maintains contact with alumni in New York, advertises and sells university merchandise through catalogs and online store to residents of New York, and is registered with the Attorney General's Charities Bureau for purposes of soliciting contributions in New York. It argues, however, that these activities are insufficient to show that it transacted business in New York for purposes of long-arm jurisdiction, and are not, in any event, substantially related to Homeland's claim that Duke was unjustly enriched by its receipt of the \$300,000 payment made by Homeland's former trustees in March 2010.

In opposition, plaintiff submits the affidavit of Thomas Donahoe, Homeland's Acting Executive Director and Chief Investment Officer, and numerous documents, to support its argument that Duke engages in substantial fundraising activities in New York, "hires fundraisers, arranges meetings, hosts events, and regularly sends agents and communications to New York for the purpose of soliciting donations" (P. Memo at 1), and that these activities are related to Homeland's claims here. According to plaintiff, Duke's fundraising operations in New York were used to solicit donations from Wyckoff and Homeland, including the \$300,000 donation at issue in this case.

Although McCaughan attests that the fundraising officer

assigned to raise money for the Legacy Fund in New York did not travel to New York in connection with Homeland's March 2010 donation, and otherwise had very limited contact directed to Homeland in New York (McCaughan Aff., ¶ 22), plaintiff's submissions raise questions as to the extent and scope of Duke's fundraising activities in New York and their relationship to Homeland's contributions. Documents submitted by plaintiff, including correspondence over a number of years between Wyckoff and Duke regarding Homeland's contributions to Duke, indicate that Wyckoff met on at least two occasions with Duke representatives in New York, purportedly in connection with Homeland's donations. Documents also indicate that Wyckoff corresponded with Duke's basketball coach about Homeland's contribution to the Coach Fund, that Wyckoff requested and received copies of the coach's book for each of Homeland's then-trustees, and that the coach met with Homeland's portfolio manager and trustees in New York in December 2007, around the time that Homeland agreed to donate \$2 million to the Coach Fund.

The scope and extent of Duke's fundraising activities in New York thus are not clear from the record now before the court. While plaintiff, on this record, has not made a prima facie showing of long-arm jurisdiction, considering the totality of the circumstances, and viewing the pleadings, affidavits and evidence submitted on this motion in a light most favorable to plaintiff,

the court finds that plaintiff has made a "sufficient start" and shown that facts to defeat the motion "may exist" so as to warrant discovery on the jurisdictional issue. See *Peterson*, 33 NY2d at 467; *Expert Sewer & Drain, LLC*, 106 AD3d at 776; *American BankNote Corp.*, 45 AD3d at 340; *Mercy Abundance, LLC v Chapman*, 2016 WL 3455943, \*2, 2016 NY Misc LEXIS 2349, \*5-6, 2016 NY Slip Op 31190(U) (Sup Ct, NY County 2016).

Accordingly, it is

ORDERED that defendant's motion to dismiss the complaint pursuant to CPLR 3211 (a) (8) is denied without prejudice to renewal upon completion of jurisdictional discovery.

Dated: March 3, 2017

ENTER:



HON. ELLEN M. COIN, A.J.S.C.