NextEngine Ventures, LLC v Network Solutions, LLC
2017 NY Slip Op 32145(U)
October 13, 2017
Supreme Court, New York County
Docket Number: 153341/17
Judge: Sherry Klein Heitler
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

----------x

NEXTENGINE VENTURES, LLC,

Plaintiff,

-against-

NETWORK SOLUTIONS, LLC,

Defendant.

----------x

Index No. 153341/17
Motion Sequence 002

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.S.C.

Defendant Network Solutions, LLC (Defendant) moves pursuant to CPLR 3211(a)(7)[1] and CPLR 3211(a)(8)[2] to dismiss Plaintiff NextEngine Ventures, LLC's amended complaint[3] in its entirety. As more fully set forth below, the motion is granted.

Plaintiff is a private investment firm that acquires and resells domain names. It was incorporated in New York in 2000. According to the Complaint, Plaintiff maintains its principal place of business in New York County.[4] Defendant offers domain name registration and website hosting services. It is registered under the laws of Delaware and is headquartered in Jacksonville, Florida. Defendant is an indirect subsidiary of Web.com Group, Inc., a Delaware corporation also headquartered in Florida.

---

[1] CPLR 3211(a)(7) provides that a party may move to dismiss a complaint on the ground that the pleading fails to state a cause of action.

[2] CPLR 3211(a)(8) provides that a party may move to dismiss a complaint against it for lack of personal jurisdiction.

[3] NYSCEF Doc. 14 (Complaint)

[4] Plaintiff's residence is a point of contention. The address Plaintiff claims as its principal place of business, 246 West Broadway, New York, NY 10013, is the same address as the law firm representing it in this case. According to documents attached to the amended complaint, however, Plaintiff resides in Burbank, California. In connection with its other domain registrations, Plaintiff's residence is listed as Hallandale, Florida (see affirmation of Timothy Hyland dated June 6, 2017, exhibit C).

According to the Complaint, on March 21, 2016 Plaintiff purchased www.quentin.com (Domain) from registrant Claudia Quentin for approximately $9,990. Before the purchase Defendant was the Domain's registrar. After the purchase Plaintiff became the Domain's registrant and GoDaddy.com LLC became the registrar. On or about May 30, 2016, Defendant allegedly caused the Domain to be transferred back to Claudia Quentin without Plaintiff's knowledge or consent and once again became the Domain's registrar.[5]

Plaintiff commenced this action on April 10, 2017. The Complaint, dated May 30, 2017, asserts three causes of action against Defendant for conversion, tortious interference with contract, and unjust enrichment (Complaint, ¶¶ 18, 22-24, 29-31):

> Defendant intentionally interfered with Plaintiff's lawful dominion and control over www.quentin.com, in absolute exclusion and derogation of Plaintiff's rights, by transferring the domain back to Claudia Quentin, and Network Solutions as the Registrar, without Plaintiff's knowledge, authorization or consent.
>
> * * * *
>
> Network Solutions had actual knowledge that an agreement existed between NextEngine and GoDaddy concerning the www.quentin.com domain.
>
> Network Solutions, without excuse or justification, knowingly and intentionally induced GoDaddy to breach its contract with NextEngine concerning the www.quentin.com domain.
>
> As a result of Network Solutions' inducement, the www.quentin.com domain was transferred from Plaintiff's GoDaddy account without any notice, authorization or consent.
>
> * * * *
>
> Once the www.quentin.com domain was wrongfully transferred from Plaintiff's GoDaddy account back to seller's Network Solutions account, Defendant benefited because it once again became the Registrar of the domain and enjoyed the benefits associated therewith, including but not limited to various monthly or yearly fees paid by all domain owners who choose Network Solutions as Registrar.
>
> Upon information and belief, Network Solutions received complaints and/or legal threats from Claudia Quentin concerning removal of the domain from her account and by removing www.quentin.com from Plaintiff's account back into Quentin's, avoided legal action from Quentin.

[5] Complaint §§ 8-14.

> Ostensibly, Network Solutions benefitted at Plaintiff's expense as Plaintiff was deprived of its right to use and enjoy the domain which it had recently purchased for a considerable monetary figure.

Plaintiff seeks $9,990 for the Domain's purchase price, $28,000 for the Domain's appraised value on the date of the alleged conversion, and attorneys' fees, costs, and disbursements.

In lieu of an answer Defendant filed this motion to dismiss, arguing that it has insufficient contacts with New York for jurisdictional purposes and that Plaintiff has failed to state cognizable claims against it. In response, Plaintiff argues that Defendant is subject to this court's jurisdiction pursuant to CPLR 302(a)(3) and that its claims are actionable under New York law.

DISCUSSION

I. Personal Jurisdiction

To oppose a motion to dismiss pursuant to CPLR 3211(a)(8), Plaintiff must demonstrate a *prima facie* basis for the exercise of personal jurisdiction. *Fantis Foods, Inc. v Standard Importing Co.*, 49 NY2d 317, 325 (1980); *see also O'Brien v Hackensack Univ. Med. Ctr.*, 305 AD2d 199, 200 (1st Dept 2003) ("[T]he burden rests on plaintiff as the party asserting jurisdiction . . ."). Accordingly, Plaintiff must allege jurisdictional contacts which, if proven, would be sufficient to demonstrate that the exercise of personal jurisdiction is proper under either New York's general jurisdiction statute (CPLR 301) or New York's long-arm statute (CPLR 302), and that the exercise of jurisdiction comports with the constitutional limits of due process. *See LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210 (2000).

A. CPLR 302(a)(3)(i)

Plaintiff contends that Defendant is subject to the jurisdiction of this court under both CPLR 302(a)(3)(i) and CPLR 302(a)(3)(ii), which collectively provide that:

> . . . 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. . . who in person or through an agent...

> 3. 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 . . .

To determine whether an entity "derives substantial revenue" from services rendered under CPLR 302(a)(3)(i), some courts have looked at the percentage of an entity's total annual income that derives from New York customers. Defendant concedes that New York customers represent 6.48% of its domain registration owners, but contends that it has no real property, bank accounts, offices, or employees here (affidavit of Linda Shutterly, sworn to May 9, 2017, ¶ 7-11).

Defendant's admission is not sufficient for jurisdictional purposes since there has been no offer of proof as to the dollar figure this 6.48% represents on an annual basis. More importantly, even though the cases Plaintiff relies upon stand for the proposition that jurisdiction can be based upon a company's annual revenue, (*see Tonns v Spiegel's*, 90 AD2d 548, 549 [2d Dept 1982]; *Allen v Canadian General Electric Co.*, 65 AD2d 39, 42 [3d Dept 1978]; *see also Reynolds v Aircraft Leasing, Inc.*, 756 NYS.2d 704, 709 [Sup. Ct. Queens Co. Oct. 30, 2002]), these cases are over 30 years old and no longer comport with the law on this issue. The Supreme Court has made clear that there must also be a connection between the chosen forum and the specific claims at issue for a state court to exercise specific jurisdiction over a foreign entity.

In other words, the fact that an entity derives substantial revenue from New York customers cannot in and of itself serve as a basis for specific jurisdiction without there also being a connection between those New York contacts and the claim before the court. The need for this connection was recently borne out by the Supreme Court in *Bristol-Myers Squibb Co. v Superior Court*, 137 S. Ct. 1773 (2017). At issue in that case was a California lawsuit filed by 600 Plavix consumers, most of whom were not California residents. The defendant, Plavix's manufacturer, was incorporated in

Delaware and headquartered in New York, but it also had five research facilities in California with 160 employees. The manufacturer moved to dismiss for lack of personal jurisdiction. The California Supreme Court denied the motion, applying a "sliding scale approach to specific jurisdiction" whereby "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts at the claim." *Bristol-Myers Squibb Co. v Superior Court*, 1 Cal. 5th 783, 806 (Cal. 2016).

The Supreme Court reversed. Its analysis focused on the long line of cases limiting specific jurisdiction over an entity to those cases that arise out of or relate to the entity's contacts with the forum. *See Daimler AG v Bauman,* 134 S. Ct. 746, 749 (2014); *Goodyear Dunlop Tires Operations, S.A. v Brown*, 564 US 915, 919 (2011); *International Shoe Co. v Washington*, 326 US 310, 316-317 (1945). The Court then explicitly rejected California's sliding scale approach as a "loose and spurious form of general jurisdiction." (*Bristol Myers*, 137 S. Ct. at 1781, internal quotations and citations omitted):

> In order for a court to exercise specific jurisdiction over a claim, there must be an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State. . . . When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State. . . . For specific jurisdiction, a defendant's general connections with the forum are not enough. As we have said, [a] corporation's 'continuous activity of some sorts within a state . . . is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.

California's sliding scale test is unquestionably distinct from New York's CPLR 302. But *Bristol Myers*' central holding – that there are constitutional roadblocks to state long-arm statutes that would otherwise permit the exercise of specific jurisdiction based upon an entity's general connections with the chosen forum – has universal application. Applying the *Bristol Myers* holding to this case, I find that the exercise of jurisdiction based solely upon Defendant's general business contacts with New York would violate due process. The only connection between this case and New York is that the Plaintiff resides here. This is not a "contact", much less a sufficient contact,

for jurisdictional purposes. Accordingly, the court declines to exercise jurisdiction pursuant to CPLR 302(a)(3)(i).

B. CPLR 302(a)(3)(ii)

Personal jurisdiction pursuant to CPLR 302(a)(3)(ii) requires Plaintiff to show that (1) the defendant committed a tortious act outside New York; (2) the cause of action arose from that act; (3) the tortious act caused an injury to a person or property in New York; (4) the defendant expected or should reasonably have expected the act to have consequences in New York; and (5) the defendant derived substantial revenue from interstate or international commerce. *LaMarca*, 95 NY2d at 214. For purposes of this motion Defendant does not dispute that the first, second, and fifth *LaMarca* elements are satisfied, but does dispute that its alleged actions caused any injury in New York or that it should have reasonably expected its actions would have an effect in New York.

Plaintiff contends that the situs of the injury in the context of a conversion or tortious interference claim is where the plaintiff resides so long as the alleged injury is economic in nature. But the cases it relies upon in this regard, *Norex Petroleum Ltd. v Blavatnik*, 23 NY3d 665, 673 (2014) and *Global Fin. Corp. v Triarc Corp.*, 93 NY2d 525, 529 (1999), discuss the accrual of economic injuries in the context of New York's borrowing statute, CPLR 202, not personal jurisdiction under CPLR 302. The cases offered by Defendant are more applicable to this case. *See McBride v KPMG Intl.*, 135 AD3d 576, 577 (1st Dept 2016) ("The situs of commercial injury is where the original critical events associated with the action or dispute took place, not where any financial loss or damages occurred"); *Cotia (USA) Ltd. v Lynn Steel Corp.*, 134 AD3d 483, 484 (1st Dept 2015) ("the situs of the injury is the location of the original event which caused the injury, not the location where the resultant damages are subsequently felt"). These cases provide that the situs of an injury in a commercial context is the location from which property is allegedly converted, not the location of any subsequent financial loss. Using this logic, Plaintiff's alleged injury occurred in

either the state where the ".com" registry is located, in this case Virginia; the location of the Domain when it was registered with GoDaddy.com, which operates out of Arizona; or the location where the Domain's registrant was located, which according to the exhibits annexed to the Complaint was California. Whichever of these three locations is considered the situs of the injury, what is important for jurisdictional purposes is that the injury did not occur in New York. And even though Plaintiff is incorporated in New York, it represented itself to be a California entity in connection with the Domain at issue. Thus it is questionable whether Defendant should have expected its activities to have consequences in New York.[6]

In any event, even if Plaintiff satisfied the *LaMarca* test, the exercise of jurisdiction over Defendant pursuant to CPLR 302(a)(3)(ii) would still violate due process. *See Walden v Fiore*, 134 S. Ct. 1115, 1122 (2014) (refining the minimum contacts analysis set forth in *Int'l Shoe Co. v Wash.*, 326 US 310 [1945]). Now, 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." *Walden*, 134 S. Ct. at 1123. Since *Walden* was decided, several New York courts have dismissed cases on jurisdictional grounds where the defendant's conduct was too attenuated to create a sufficient connection with the chosen forum. *See Waggaman v Arauzo*, 117 AD3d 724, 726 (2d Dept 2014); *Delfasco, LLC v Powell*, 52 Misc. 3d 689, 693 (Sup. Ct. Kings Co, Apr. 25, 2016, Ash, J.). Defendant's alleged tortious conduct in this case is exactly the kind of attenuated connection that violates due process under *Walden*. The court therefore declines to exercise jurisdiction over the Defendant pursuant to CPLR 302(a)(3)(ii).[7]

---

[6] Plaintiff's contention that Defendant should have researched Defendant's registration as a New York limited liability company is unavailing.

[7] Worth noting are the numerous federal court decisions holding that jurisdiction cannot be based solely on the fact that an alleged tort has financial effects on a New York entity. *See Whitaker v American Telecasting,*

C. General Jurisdiction

Plaintiff does not argue, and there is no evidence to show, that Defendant is subject to general personal jurisdiction. *See* CPLR 301; *Landoil Resources Corp. v Alexander & Alexander Servs., Inc.*, 77 NY2d 28, 33 (1990) ("A foreign corporation 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."); *Daimler AG*, 134 S. Ct. at 749 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 [2011]) (the exercise of general personal jurisdiction is appropriate only where a corporation's "'affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State.'"). Neither party disputes on this motion that Defendant derives less than 10% of its revenue from New York customers, maintains no offices in New York, and has no real property, bank accounts, or other assets here. The exercise of general jurisdiction over the Defendant would therefore be patently improper.

In sum, the court finds that it has no jurisdiction over the Defendant in this action. For this reason Plaintiff's claims must be dismissed.

Inc., 261 F.3d 196, 209 (2d Cir. 2001) ("The occurrence of financial consequences in New York due to the fortuitous location of plaintiffs in New York is not a sufficient basis for jurisdiction under § 302(a)(3) where the underlying events took place outside New York"); *Friedr. Zoellner Corp. v Tex Metals Co.*, 396 F.2d 300, 303 (2d Cir. 1968) (no jurisdiction under CPLR 302(a)(3)(ii) over Texas corporation that entered into agreement over the telephone with plaintiff doing business in New York where injury occurred in New Orleans); *Stein Fibers, Ltd. v Bondex Telas Sin Tejar, C.A.*, 2009 US Dist. LEXIS 9619, *15 (NDNY Feb. 10, 2009) ("The fact that the alleged conversion would cause commercial harm for Plaintiff in New York is not enough to conclude that the injury occurred within the state."); *Popper v Podhragy*, 48 F. Supp. 2d 268, 274 (SDNY Dec. 3, 1998) ("To base jurisdiction solely on the fact that plaintiffs live in New York and that the damage arising from an out-of-state tort occurred here would raise serious constitutional questions."; *Kelly v MD Buyline, Inc.*, 2 F. Supp. 2d 420, 439 (SDNY Feb. 3, 1998) ("New York courts have consistently held that incidental economic damage to a plaintiff in this state by virtue of the fact that he is domiciled here does not suffice to permit assertion of jurisdiction over an out-of-state defendant."); *Weisman v Rosenker*, 1985 U.S. Dist. LEXIS 23538 (SDNY Jan. 10, 1985) (defendant's conversion of violins in California may have caused pecuniary harm to plaintiffs in New York but did not constitute injury within New York for purposes of jurisdiction under CPLR 302(a)(3)(ii)).

II. Sufficiency of Plaintiff's Claims

Assuming the court could exercise personal jurisdiction over the Defendant, the Complaint also fails to state a cause of action for conversion or for tortious interference.

A. Conversion

Plaintiff alleges that Defendant committed the tort of conversion by transferring the Domain back to Ms. Quentin. Defendant, relying on Virginia law, argues that a domain name cannot be the subject of a conversion claim. Plaintiff responds that a choice of law analysis is necessary because there is a clear conflict between New York and Virginia Law on this issue, and that the court should apply New York law under which its conversion claim would be allowed to proceed.

Plaintiff's conversion claim fails as a matter of law under both Virginia law and New York law. As such a choice of law analysis is moot. Under Virginia law, a domain name cannot be the subject of a conversion claim since a domain name is not considered personal property. *See Network Solutions, Inc. v Umbro Int'l, Inc.*, 259 Va. 759, 770 (2000) ("a domain name registration is the product of a contract for services between the registrar and registrant."); *Alexandria Surveys Int'l, LLC v Alexandria Consulting Group, LLC*, 500 BR 817, 822 (E.D. Va. Nov. 7, 2013) ("Virginia does not recognize an ownership interest in telephone numbers and web addresses. . . ."). New York law is the same as Virginia law in this regard. *See Wornow v Register.Com, Inc.*, 8 AD3d 59, 59-60 (1st Dept 2004) ("a domain name that is not trademarked or patented is not personal property, but rather a contract right that cannot exist separate and apart from the services performed by a registrar.").

Plaintiff complains that the *Wornow* decision is outdated, but the cases it cites, while more recent, having nothing to do with domain names. For example, in *Thyroff v Nationwide Mut. Ins. Co.*, 8 NY3d 283, 292 (2007), the court held that electronic records could be the subject of a conversion claim. Plaintiff cites *Astroworks, Inc. v Astroexhibit, Inc.*, 257 F. Supp. 2d 609 (SDNY

Mar. 11, 2003) for the proposition that one can be liable for the conversion of a website, but what was really claimed in *Astroworks* is that the defendant wrongfully appropriated an idea for a space-related website. This case involves the alleged conversion of a domain name, not electronic records or ideas. The First Department's holding in *Wornow* is directly on point.

B. Tortious Interference

To state a claim for tortious interference with a contract, a plaintiff must allege "(1) the existence of a valid contract between plaintiff and a third party, (2) defendant's knowledge of the contract, (3) defendant's intentional procurement of a breach of the contract without justification, (4) actual breach of the contract, and (5) resulting damages." *Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 294, 299 (1st Dept 1999); *see also RLR Realty Corp. v Duane Reade, Inc.*, 145 AD3d 444, 445 (1st Dept 2016). "Agreements that are terminable at will are classified as only prospective contractual relations, and thus cannot support a claim for tortious interference with existing contracts." *American Preferred Prescription, Inc. v Health Mgmt.*, 252 AD2d 414, 417 (1st Dept 1998). Annexed to Defendant's moving papers is a copy of GoDaddy's Universal Terms of Service Agreement. Plaintiff does not dispute that its relationship with GoDaddy was subject to those terms, including the following (Hyland Affirmation, Exhibit D, § 10):

> GoDaddy expressly reserves the right to deny, cancel, terminate, suspend, lock, or modify access to (or control of) any Account or Services (including the right to cancel or transfer any domain name registration) for any reason (as determined by GoDaddy in its sole and absolute discretion) . . . .

In light of GoDaddy's seemingly unambiguous right to terminate its agreements at will, there appears to have been no breach of contract upon which Plaintiff's tortious interference claim could be founded.

Nonetheless Plaintiff argues that its tortious interference claim can be predicated upon a terminable-at-will contract such as the one here given Defendant's "wrongful" conduct, citing *Guard-Life Corp. v S. Parker Hardware Mfg. Corp.*, 50 NY2d 183, 194 (1980) (internal citations

omitted) ("Where contracts terminable at will have been involved, we have upheld complaints and recoveries in actions seeking damages for interference when the alleged means employed by the one interfering were wrongful, as consisting of fraudulent representations . . . or as in violation of a duty of fidelity owed to the plaintiff by the defendant by reason of a relation of confidence existing between them . . . .") Significantly, no such wrongful conduct was borne out in the Complaint. Plaintiff's counsel merely speculates that Defendant urged GoDaddy to cancel its agreement with Plaintiff based upon alleged false representations from Ms. Quentin that the Domain name transfer was unauthorized. Even if this were true, and Defendant had relayed information from Ms. Quentin to GoDaddy, it is unclear how such conduct would constitute tortious behavior by the Defendant.

CONCLUSION

Accordingly, it is hereby

ORDERED that Defendant's motion is granted; and it is further

ORDERED that the Complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk of the court shall enter judgment and mark his records accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: Oct. 13, 2017

SHERRY KLEIN HEITLER, J.S.C.