Hart Lyman Constr., LLC v Bergin
2017 NY Slip Op 32946(U)
November 13, 2017
Supreme Court, Onondaga County
Docket Number: 2016EF978
Judge: Deborah H. Karalunas
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

HART LYMAN CONSTRUCTION, LLC,

Plaintiff,

Index No.: 2016EF978
RJI No.: 33-16-1358

-vs-

SCOTT BERGIN, individually; EPMM COLORADO LLC; and SCOTT BERGIN LLC; collectively d/b/a EDIPURE,

Defendants.

DECISION

Plaintiff Hart Lyman Construction, LLC ("Hart Lyman") is a real estate development and construction company with its principal office in Syracuse, New York. Defendant Scott Bergin is a resident of Colorado and the managing member of defendants Scott Bergin LLC and EPMM Colorado, LLC, limited liability companies formed under the laws of Colorado with principal places of business in Colorado. Collectively defendants are doing business under the name Edipure and are in the business of growing, cultivating, producing, processing, selling and distributing legal cannabis within the State of Colorado.

By summons and complaint filed March 11, 2016, plaintiff sued defendants in five causes of action for: 1) breach of contract; 2) breach of fiduciary duty; 3) an accounting; 4) usurpation of corporate opportunities; and 5) unjust enrichment. The claims arise out of an undated Binding Memorandum of Understanding executed by the parties on or about November 24, 2015 ("MOU"). The purpose of the MOU was to formalize a business relationship between the parties as partners/members to:

> grow, cultivate, produce, process, sell, market and distribute legal cannabis (medical and recreational/adult use) internationally and in multiple states including but not limited to Colorado (but excluded from this MOU), California, Nevada, Washington, Hawaii, Maryland (the "Project or Projects").

MOU, Recital ¶¶ 1, 4.

Pursuant to the terms of the MOU, Hart Lyman's obligations were to provide oversight and to manage acquisition of real estate, negotiate construction contracts, and pursue financing and equity options. Edipure's role was to oversee cultivation and production of the cannabis-based products. The MOU required Hart Lyman to pay Edipure $450,000 and, in exchange, Hart Lyman was to receive a 33% membership interest "or equivalent equity position in each Project-specific operating entity," excluding Colorado. In addition, the parties were to hold equal interests in any acquired real estate, and Hart Lyman and Edipure were to be paid by each project-specific operating entity for their respective project-specific services.

By notice of motion dated April 22, 2016, defendants moved to dismiss the action pursuant to CPLR 3211(a)(8) based on lack of personal jurisdiction. The Court ordered the parties to conduct jurisdictional discovery and, upon completion, to submit additional evidence to the Court. The parties' additional jurisdictional submissions were submitted on November 1, 2017.

The following facts are undisputed:

1) Prior to discussions surrounding the MOU, the parties had an indirect relationship concerning New York Canna, Inc. ("NY Canna"), an entity that participated in an unsuccessful application for a medical marijuana license in New York. EPMM Colorado, LLC ("EPMM Colorado") has a 25% equity interest in EPMM NYC Corp. ("EPMM NYC"), a New York corporation, which in turn owns a 25% interest in NY Canna. Scott Bergin does not have a direct interest in either EPMM NYC or NY Canna and neither EPMM NYC or NY Canna are named defendants in this action. Bergin Aff. ¶¶ 11-15;

2) In the summer of 2015, the parties met in New York on two occasions. At the first meeting, in July 2015, the parties discussed their "various businesses, where [they] did business, where they were trying to do business, and [NY] Canna." Hart Tr. at 10, 19;

3) Hart Lyman initiated the relationship with defendants that resulted in the MOU. More specifically, on August 31, 2015 Seamus Lyman, Hart Lyman's senior partner and general counsel, emailed Bergin:

> Per our previous discussions last week, I put together a comprehensive list that represents some key points how our company [Hart Lyman] can hopefully add value, increase productivity, lower some real estate and construction costs, and most importantly, take away key responsibilities and burdens away from Edipure/EPMM, so those entities and you guys can focus on the items you need to grow (no pun intended) the business to the level discussed in Israel. For your consideration

> and review, I have also attached a pdf of most of our key personnel so you have a better of idea of who else we would be bringing to the table.

The email also outlined that Hart Lyman's contributions would be with site selection, permitting, leasing, financing, construction, asset management, legal and compliance. Burch Aff. Exh. 8;

4) Seamus Lyman drafted the MOU. Lyman Tr. at 7. Thereafter, defendants made changes related to the timing and apportionment of payments. Id. at 8-9;

5) The MOU was exchanged by email and signed by defendants in Colorado. Bergin Reply Aff. ¶ 17;

6) The projects identified in the MOU and contemplated and pursued by the parties were in Nevada, Maryland, California, Washington State, Israel, and Jamaica. Lyman Tr. at 15.

7) The MOU did not make any reference to a project in New York, and did not propose the purchase of any property in New York. In addition, subsequent to the MOU the parties did not pursue any projects in New York. Lyman Tr. at 15;

8) The parties met in a number of locations including Nevada, Maryland, California, Washington State, Florida and Jamaica to explore projects in those jurisdictions. Hart Tr. at 25-32;

9) Hart Lyman went to Nevada to scout for real estate, but never got so far as raising money for that prospective project. Bergin Tr. at 86;

10) The $450,000 payment required of Hart Lyman by the MOU was intended, at least in point, to reimburse EPMM Colorado the expenses it had incurred in obtaining and maintaining the Nevada license and real estate. Bergin Tr. at 86; and

11) Bergin never met with Lyman in New York; he met with him on multiple occasions in Colorado and Israel. Lyman Tr. at 7-8.

Discussion

Defendants argue the court lacks jurisdiction over them because Bergin is a resident of Colorado, both Scott Bergin, LLC and EPMM Colorado are Colorado limited liability companies with principal places of business in Colorado, and none of the defendants transacted business in New York. Bergin Aff. ¶ 3-15.

Plaintiff opposes the motion relying on CPLR 302(a)(1) and 302(a)(3). With respect to CPLR 302(a)(1), plaintiff argues defendants transacted the requisite related business in New York by applying for a New York medical marijuana license, engaging Hart Lyman "to explore other business opportunities with projects in other states and countries," communicating with Hart Lyman via in person meetings, telephone conferences and email, and producing marketing materials proclaiming that Epicure's products were sold in many states and would "soon" include New York. Hart Aff. ¶¶ 7-12 and Exh. A. Regarding CPLR 302(a)(3), plaintiff argues defendants committed an out-of-state tort -- usurpation of corporate opportunities – which caused plaintiff to suffer in-state damages consisting of loss of the business "it would have gained once the joint venture was able to initiate a cannabis business in New York." Hart Lyman MOL p. 10-11.

On a motion to dismiss pursuant to CPLR 3211(a)(8), the plaintiff bears the burden of proving jurisdiction over the moving party. Halas v. Dicks Sporting Goods, 105 A.D.3d 1411, 1412 (4th Dep't 2013); Joseph v. Siebtechnik, G.M.B.H., 172 A.D.2d 1056 (4th Dep't 1991). This "entails making legally sufficient allegations . . . including an averment of facts that, if credited, would suffice" to establish jurisdiction. Penguin Grp. (USA) Inc. v. Am. Budda, 609 F.3d 30, 35 (2d Cir. 2010).

In New York, long arm jurisdiction exists where CPLR 302 is satisfied and the exercise of jurisdiction comports with due process. LaMarca v. Pac-Mor Mfg. Co., 95 N.Y.2d 210, 214 (2000). Pertinent here, CPLR 302(a)(1), authorizes a court to exercise personal jurisdiction over non-domiciliaries or their agents for claims arising from a defendant's transaction of business in this state or contract to supply goods or services in the state. More specifically, CPLR 302(a)(1) provides:

> 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-domicilliary . . . who in person or through an agent:
>
> 1. transacts any business within the state or contracts anywhere to supply goods or services in the state.

Thus, under this statute, "long arm jurisdiction over a non-domicilliary exists only where (1) a defendant transacted business within the state and (ii) the cause of action arose from that transaction of business. If either prong of the statute is not met, jurisdiction cannot be conferred under CPLR 302(a)(1)." Johnson v. Ward, 4 N.Y.3d 516, 519 (2005). Notably, "there must be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State," McGowan v. Smith, 72 A.D.2d 75, 79 (4th Dep't 1979), and a "plaintiff may not rely on its own activity . . . as a predicate for jurisdiction over the defendant." Pramer S.C.A. v. Abaplus Int'l Corp., 76 A.D.3d 89, 95 (1st Dep't 2010). Moreover, "[w]hile place of contract may be a factor to be considered in determining whether

the claim arose from a transaction of business within New York State, it is insufficient to confer jurisdiction." McGowan, 72 A.D.2d at 79. To satisfy the nexus requirement of the statute, "a substantial relationship must be established between a defendant's transactions in New York and a plaintiff's cause of action." Johnson, 4 N.Y.3d at 519. "[J]urisdiction is not justified where the relationship between the claim and the transaction is too attenuated." Id. at 520.

Here, to establish the requisite transaction of business in New York, plaintiff relies on a few meetings between the parties in New York, an exchange of emails and telephone calls, defendants' execution of a contract later delivered to New York, defendants' marketing materials, activity of non-party NY Canna, and plaintiff's own New York presence and activities. These acts are insufficient to show defendants purposefully availed themselves of the privilege of conducting business in New York. Even assuming plaintiff met its burden on this element, plaintiff utterly failed to establish a sufficient nexus between defendants' purported New York activity and plaintiff's breach of contract and related claims. Cianciola v. A.O. Smith Water Prods. Co., 111 A.D.3d 1328 (4th Dep't 2013). Plaintiff admits that defendants' involvement with the application for a medical marijuana license in New York State was through a separate entity -- NY Canna -- not a party to this action. Hart Aff. ¶ 9. Also, while plaintiff asserts that its relationship with defendants under the MOU "could extend" into New York, there simply is no evidence that in connection with the MOU defendants engaged in any sufficiently purposeful activities within New York or otherwise directed at New York. Hart Aff. ¶ 21. Under these circumstances, plaintiff fails to satisfy the requirements of CPLR 302(a)(1) and the minimum due process requirements. Niagara Mohawk Energy Mktg., Inc. v. Entergy Power Mktg. Corp., 270 A.D.2d 872, 873 (4th Dep't 2000).

In opposition to defendants' motion to dismiss, plaintiff now raises an alternative jurisdictional basis – CPLR 302(a)(3). Plaintiff claims defendants' breach of the MOU outside the state caused financial harm to plaintiff within the state. Hart Lyman MOL pp. 10-11; Hart Lyman Supp. MOL pp. 13-14.

CPLR 302(a)(3) authorizes a court to exercise personal jurisdiction over a non-domiciliary who:

> [C]ommits a tortious act without the state causing injury to person or property within the state [if he]
>
> . . .
>
> (ii) expect or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

Thus, by its terms, jurisdiction under CPLR 302(a)(3) requires commission of a tort outside New York causing injury in New York. Importantly, contract claims are not torts invoking jurisdiction under CPLR 302(a)(3). Fantis Foods v. Standard Importing Co., 49

N.Y.2d 317, 324 (1980). Although plaintiff attempts to cast his claims in tort, they are not. Moreover, plaintiff's make no legitimate claim to have suffered injury in New York. Regarding injury, it long has been held:

> the residence or domicile of the injured party within a State is not a sufficient predicate for jurisdiction, which must be based upon a more direct injury within the State and a closer expectation of consequences within the State than the indirect financial loss resulting from the fact that the injured person resides or is domiciled there.

Penguin Grp. (USA) Inc. v. American Buddha, 16 N.Y.3d 295, 303 (2011); see also, Fantis Foods, 49 N.Y.2d at 326 (jurisdiction requires a "closer expectation of consequences within the State than the indirect financial loss resulting from the fact that the injured person resides or is domiciled there"); Bloomgarden v. Lanza, 143 A.D.3d 850 (2d Dep't 2016)(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 by plaintiff).

Here, plaintiff's claim of in-state injury is premised entirely on the potential indirect financial loss resulting from its own New York presence, a basis expressly rejected by our courts. See e.g., Penguin Grp. (USA) Inc., 16 N.Y.3d at 303 (2011); Fantis Foods, 49 N.Y.2d at 326

Based on the foregoing, the Court has no jurisdiction over defendants, and defendants' motion to dismiss plaintiff's complaint is GRANTED in its entirety.

November 13, 2017
Syracuse, New York

Hon. Deborah H. Karalunas, J.S.C.