Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE MARGUERITE A. GRAYS** IAS PART 4
Justice

x

EDWARD LOWY, JONATHAN LEIFER, WHITEFISH GROUP LLC, CLOUD CAP PARTNERS, LLC,

Plaintiff(s)

-against-

CHALKABLE, LLC, CHALKABLE, INC., POWERSCHOOL GROUP LLC, MICHAEL LEVY, ZACHARY Z. HONIG a/k/a ZOLI HONIG.

Defendant(s)

x

Index Number 714714 2016

Motion Date May 23, 2017

Motion Cal. Numbers 8

Motion Seq. Numbers 1

The following papers numbered 1 - 6 read on this motion by defendants PowerSchool Group LLC (PowerSchool) and Chalkable, Inc., for an Order pursuant to CPLR §3211 (a)(3), (7) and (8), dismissing the plaintiff's complaint.

	Papers Numbered
Notices of Motion - Affidavits - Exhibits	1-4
Answering Affidavits - Exhibits	5
Reply Affidavits	6

Upon the foregoing papers it is ordered that this motion is determined as follows:

This is an action sounding in breach of contract, breach of fiduciary duty, declaratory judgment and constructive trust, commenced by plaintiffs Edward Lowy, Jonathan Leifer, Whitefish Group LLC, and Cloud Cap Partners, LLC (collectively referred to as plaintiffs). In the complaint, plaintiffs have alleged that plaintiffs Edward Lowy (Lowy) and Jonathan Leifer (Leifer) entered into an agreement with Levy and Honig, in or around September 2011, to become partners in a joint venture to own and develop several websites and web-based companies.

Plaintiff Cloud Cap Partners, LLC (Cloud Cap) was allegedly formed in September 2011, under the laws of the State of Delaware, in furtherance of this agreement. Plaintiffs have alleged that Lowy and Leifer held two-thirds of the total membership interest in Cloud

Cap, while Levy and Honig held one-third of the total membership interest. Plaintiff Whitefish Group, LLC (Whitefish), an entity formed under the laws of the State of Delaware, was an entity in which Lowy and Leifer allegedly owned one hundred percent membership interests. Plaintiffs have alleged that in or around October 2011, Lowy and Leifer used funds from Whitefish, in the amount of $45,000, to provide funding to Cloud Cap, for the purpose of having Cloud Cap invest said funds into Chalkable LLC, an entity that plaintiffs alleged was wholly controlled by Levy and Honig, and which was formed under the laws of the State of Delaware. Plaintiffs have alleged that in exchange for this investment in or around October 2011, Lowy and Leifer were promised a one-third membership interest in Chalkable, LLC.

In the complaint, plaintiffs have alleged that Chalkable LLC, was purchased by Chalkable, Inc., also a corporation formed under the laws of the State of Delaware, which owned and operated software that facilitates communication in schools and provided educational data management in schools. PowerSchool is a limited liability company formed under the laws of the State of Delaware, which owned and operated an education technology platform that facilitates information sharing in a school system. Subsequently, PowerSchool allegedly purchased Chalkable, Inc.

Plaintiffs have alleged that in or around October 2011, Cloud Cap purchased a website known as "Life's Vigor" and in or around December 2011, Cloud Cap purchased a website known as "British Information," using funds on both occasions exclusively provided by Lowy, Leifer and Whitefish, which websites Levy and Honig agreed to develop, manage and operate for Cloud Cap. Plaintiffs have alleged that Levy and Honig failed to perform under the agreement. Plaintiffs' causes of action as they have been asserted in the complaint are as follows: the first cause of action has alleged that Honig and Levy breached an agreement with Lowy and Leifer; the second cause of action has alleged that Honig and Levy breached fiduciary duties they owed to Lowy, Leifer and Cloud Cap; the third cause of action has alleged that all defendants breached an agreement with Lowy, Leifer and Cloud Cap; the fourth cause of action is for a declaratory judgment against all defendants; and the fifth cause of action is for a constructive trust against all defendants.

PowerSchool and Chalkable, Inc., have moved for dismissal of plaintiffs' complaint pursuant to CPLR §3211(a)(3)(7) and (8). The Court will address the branch of PowerSchool's and Chalkable, Inc.'s, motion that has been made pursuant to CPLR 3211(a)(8), which provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... the Court has not jurisdiction of the person of the defendant...".

PowerSchool and Chalkable, Inc., have argued that courts in the State of New York do not have general or specific personal jurisdiction over them. In support of these arguments they have asserted that they are not subject to general personal jurisdiction in the State of New York, pursuant to CPLR §301 or §302, because they both exist under the laws of the State of Delaware, are both headquartered in the State of California and that both businesses are operated from the State of California. In opposition, plaintiffs have argued that at the time of the commencement of the instant action, PowerSchool and Chalkable, Inc., were engaged in a continuous and systematic course of doing business in the State of New York, which was so constant and pervasive that it essentially rendered them at home in the State of New York and, thus, subject to general personal jurisdiction.

In general, Courts in the State of New York may exercise personal jurisdiction over a party on the basis of consent to jurisdiction, domicile and presence in the state, more commonly referred to as general jurisdiction, or as a result of a party's contacts in the state, more commonly referred to as specific jurisdiction (CPLR §§301, 302). CPLR §301 provides that "[a] Court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore."

"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" (*Goel v Ramachandran*, 111 AD3d 783, 786 [2013], quoting *Landoil Resources Corp. v Alexander & Alexander Servs.*, 77 NY2d 28, 33 [1990]; *see Laufer v Ostrow*, 55 NY2d 305, 309-310 [1982]; *see Fernandez v DaimlerChrysler, AG.*, 143 AD3d 765, 766 [2016]). Pursuant to *Daimler AG v Bauman*, due process limits a court's assertion of "jurisdiction over a foreign corporation 'to hear any and all claims against [it]' only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive 'as to render [it] essentially at home in the forum State'" (– US –, – , 134 S Ct 746, 751 [2014], quoting *Goodyear Dunlop Tires Operations, S.A. v Brown*, 564 US 915, 919 [2011).

CPLR §302(a)(1) provides the following:

> "Acts which are the basis of jurisdiction. 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: 1. transacts any business within the state or contracts anywhere to supply goods or services in the state...".

"CPLR §302(a)(1) jurisdiction is proper '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'" (*Fischbarg v Doucet*, 9 NY3d 375, 380 [2007], quoting *Deutsche Bank Sec., Inc. v. Montana Bd. of Invs.*, 7 NY3d 65, 71 [2006]). "Whether a non-domiciliary is transacting business within the meaning of CPLR §302(a)(1) is a fact based determination" (*Paterno v Laser Spine Inst.*, 24 NY3d 370, 376 [2014]).

"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, 1322–23 [2011]; *see Carrs v Avco Corp.*, 124 AD3d 710 [2015]). "[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 [2000]; *see Weitz v Weitz*, 85 AD3d 1153, 1153-1154 [2011]). The Court notes that practice under CPLR §3211 "protects the party to whom essential jurisdictional facts are not presently known..." and that a "prima facie showing of jurisdiction ... simply is not required" in every case (*Peterson v Spartan Indus., Inc.*, 33 NY2d at 466-467).

After careful consideration of the pleadings and evidence submitted herewith, the Court finds that the plaintiffs have failed to sufficiently demonstrate that this Court has jurisdiction over defendants Chalkable, Inc., and PowerSchool. Initially, as noted in the *Daimler* case, the United States Supreme Court has held that a "corporation that operates in many places can scarcely be deemed at home in all of them (*Daimler AG v. Bauman*, 134 S.Ct. 746). It is undisputed that defendants Powerschool and Chalkable, Inc., do not maintain their principal places of business in New York, and were not incorporated in New York. Nor can it be said that defendants Power School and Chalkable, Inc., are "essentially at home in the forum State" to wit, New York (*Motorola Credit Corp. v. Standard Chartered Bank*, 24 NY3d 149). Finally, plaintiff's have failed to set forth sufficient facts to establish that this Court should exercise specific jurisdiction over said defendants by demonstrating that "a substantial relationship" between the Power School Companies' contacts with New York "and the transaction out of which the [plaintiff's] cause of action arose", (*SPCA of Upstate New York, Inc. v. American Working Collie Association*, 18 NY 3d 400).

In light of the above, PowerSchool and Chalkable, Inc., are entitled to dismissal of the complaint pursuant to CPLR §3211(a)(8). The remaining branches of the defendant PowerSchool and Chalkable, Inc.'s motion are denied as academic.

Accordingly, the motion to dismiss the complaint by defendants PowerSchool and Chalkable, Inc., is granted and the plaintiff's complaint is dismissed.

Dated: SEP 29 2017

J.S.C.

FILED
OCT 23 2017
COUNTY CLERK
QUEENS COUNTY