

Prodea Inv., LLC v BSEP Plus Capital Group, LLC
2018 NY Slip Op 30796(U)
May 1, 2018
Supreme Court, New York County
Docket Number: 656124/2016
Judge: John J. Kelley
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 56**

PRODEA INVESTMENT, LLC,

Index No. 656124/2016

Plaintiff,

-against-

BSEP PLUS CAPITAL GROUP, LLC,

Defendant.

BSEP PLUS CAPITAL GROUP, LLC,

Decision and Order

Third-Party Plaintiff,

-against-

PRODEA SYSTEMS, INC.,

Third-Party Defendant.

Plaintiff, Prodea Investment, LLC (PIL), is a single purpose entity that an investor formed solely to obtain funding for the third-party defendant, Prodea Systems, Inc. (“Prodea Systems”). On August 22, 2016, PIL entered into a financing term sheet with Prodea Systems in which PIL agreed to provide a convertible, unsecured, \$5 million bridge loan to Prodea Systems and to provide senior-secured-convertible debt and warrant financing of a minimum of \$35 million and a maximum of \$70 million.

In August and September 2016, PIL entered into two separate agreements with the defendant, BSEP Plus Capital Group, LLC (“BSEP”) in which BSEP agreed to facilitate loans to Prodea Systems. Under the agreements, plaintiff paid BSEP \$50,000, which BSEP agreed to refund if it was unable to fund the financing requests within a reasonable time. The plaintiff claims that BSEP never obtained any funding and has refused to refund the \$50,000. The complaint asserts causes of action for breach of contract and fraud.

BSEP thereafter filed a third-party complaint alleging breach of contract and unjust enrichment against Prodea Systems. BSEP claims that it provided all

necessary financing, but the plaintiff and Prodea Systems refused to finalize the transaction. The third-party complaint alleges that PIL either is an alter ego or under the complete control and dominion of Prodea Systems. It seeks to hold Prodea Systems liable for PIL's alleged contractual breach, even though Prodea Systems was not a party to any of the contractual agreements between PIL and BSEP.

Prodea Systems' motion to dismiss alleges that the court lacks personal jurisdiction and that the third-party complaint fails to state a cause of action. In deciding a CPLR § 3211 motion to dismiss, a court must accept the complaint's factual allegations as true (*see EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]); however, allegations such as bare legal conclusions and factual claims that are contradicted by the documentary evidence are not entitled to such consideration (*Stuart Lipsky, P.C. v Price*, 215 AD2d 102, 103 [1st Dept 1995]). Furthermore, as a third-party plaintiff, BSEP bears the burden of presenting sufficient evidence to establish personal jurisdiction (*see, e.g., Stewart v Volkswagen of Am.*, 81 NY2d 203, 206-07 [1993]); *Coast to Coast Energy, Inc. v Gasarch*, 149 AD3d 485, 486 [1st Dept 2017]; *Copp v Ramirez*, 62 AD3d 23, 28 [1st Dep't 2009] ("The burden rests on [the party] asserting jurisdiction"). A plaintiff who seeks to invoke the court's *in personam* jurisdiction over a non-resident defendant must expressly allege facts in its complaint that bring the non-resident within CPLR §§ 301 and 302 (*see Teplin v Manqfort*, 81 AD2d 531, 531 [1st Dept 1981]). Where such allegations are lacking, the complaint must be dismissed.

The court finds that BSEP's third-party complaint fails to allege facts sufficient to demonstrate that Prodea Systems is subject to the court's CPLR § 301 general jurisdiction. Prodea Systems is a Delaware corporation that maintains its principal place of business in Texas. It has not registered to conduct business in New York (*see Magdalena v Lins*, 123 AD3d 600, 601 [1st Dept 2014]).

Nor is there any basis for long-arm jurisdiction under CPLR § 302. A plaintiff can establish specific long-arm jurisdiction over a defendant by alleging that the defendant: (1) transacted business in New York; (2) committed a tortious act within New York; (3) regularly engaged in a persistent course of conduct or derived revenue from New York or committed a tortious act outside of New York that caused injury within New York; or (4) owns or uses any real property in New York (CPLR §302). To confer jurisdiction in New York under this statute, the

claimed New York activity must be purposeful and substantially related to the claims sued upon (*see D&R Global Selections, S.L. v Bodgea Oregario Falcon Pinerio*, 90 AD3d 403, 404 [1st Dept 2011]). “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” (*Fishbarg v Doucet*, 9 NY3d 375, 380 [2007]). Prodea Systems did not execute any contracts in New York related to this action, and it did not agree to perform any contractual duties in New York. There is no evidence or allegation that Prodea Systems committed any tortious conduct in New York.

The only question is whether BSEP has alleged facts in its third-party complaint that are sufficient to show that the plaintiff was acting as an agent or alter ego of Prodea Systems, and that it was in fact controlled by Prodea Systems. The court finds that the third-party complaint is insufficient. To establish that a defendant acted through an agent, a plaintiff must “convince the court that [the New York actors] engaged in purposeful activities in this State in relation to [the] transaction for the benefit of and with the knowledge and consent of [the defendant] and that [the defendant] exercised some control over [the New York actors]” (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]). “[T]o make a prima facie showing of ‘control,’ a plaintiff’s allegations must sufficiently detail the defendant’s conduct so as to persuade a court that the defendant was a ‘primary actor’ in the specific matter in question; control cannot be shown based merely upon a defendant’s title or position within the corporation, or upon conclusory allegations that the defendant controls the corporation” (*Karabu Corp. v Gitner*, 16 F Supp 2d 319, 324 [SDNY 1998]; *see also Polansky v Gelrod*, 20 AD3d 663, 664 [3d Dept 2005]).

Here, the third-party complaint merely alleges that “[BSEP] reasonably understood, and was induced to believe, that PIL and [Prodea Systems] operated together, that PIL was the effective agent of [Prodea Systems].” The third-party complaint also claims that the plaintiff was the alter ego of Prodea Systems and was totally controlled and/or dominated by Prodea Systems. These conclusory allegations of agency or control are insufficient to even establish personal jurisdiction, let alone establish that Prodea Systems could be held liable for the plaintiff’s breach of contract (*see Gasarch*, 149 AD3d at 486; *Polansky*, 20 AD3d at 664). Prodea Systems and the plaintiff appear to be separate independent organizations that do not have any overlapping ownership. An individual investor, who was unaffiliated with Prodea Systems, created the plaintiff as a special

purpose entity in an arms-length transaction with Prodea Systems. Prodea Systems escrowed \$50,000 for the plaintiff to obtain financing for Prodea Systems, but the plaintiff failed to complete this task. Since Prodea Systems received no benefits from the subject transaction and played no role in the agreements between the plaintiff and BSEP, it cannot be held liable for any breach of the agreement by the plaintiff. In fact, Prodea Systems claims that, far from being alter egos with the plaintiff, it actually is adverse to the plaintiff and could choose to take legal action against it for breaching its obligations under the Financing Term Sheet.

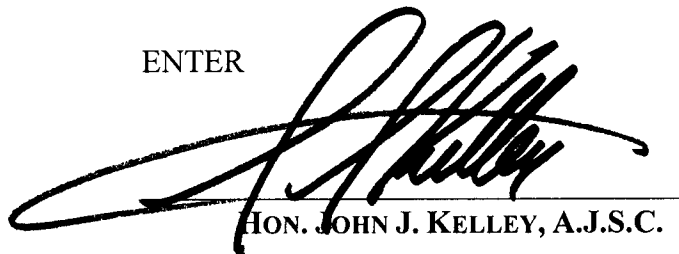
The opposition to the motion fails to adequately rebut the assertions by the plaintiff and Prodea Systems. BSEP has not set forth any facts indicating that Prodea Systems had any input over how the plaintiff would secure the financing or with whom the plaintiff would engage in transactions in order to do so. There is no indication that Prodea Systems knew anything about the agreements between the plaintiff and BSEP, or that Prodea Systems rejected or controlled the plaintiff's efforts to secure the financing. There is no evidence that Prodea Systems was a primary actor in the subject transactions, and BSEP has not sufficiently plead any exercise of control beyond its bald assertion that Prodea Systems had dominion and control over the plaintiff. These allegations are plainly insufficient to demonstrate agency, and, therefore, the third-party complaint must be dismissed due to lack of jurisdiction and failure to state a cause of action.

Although BSEP asks for leave to replead, the motion and exhibits contain no indication that it possesses knowledge of any additional facts that would support the court's exercising jurisdiction over Prodea Systems. Accordingly, leave to replead is denied.

The motion to dismiss the third-party complaint is granted. The third-party complaint is dismissed. Defendant's application for leave to replead is denied. The remaining parties shall appear for a preliminary conference on June 5, 2018 at 10:30 am in Room 311, 71 Thomas Street, New York, New York.

Dated: May 1, 2018

ENTER



HON. JOHN J. KELLEY, A.J.S.C.