SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 56

THE LEGACY AGENCY, INC.,

Plaintiff,

-against-

TRENT A. JOHNSON,

Defendant.

Index No. 652787/17

Decision and Order

HON. JOHN J. KELLEY

The plaintiff, a talent and sports marketing agency, is suing the defendant, Trent Johnson, a former college basketball coach. The defendant has moved to dismiss on the ground that the court lacks personal jurisdiction.

The plaintiff is a Delaware corporation, with its principal place of business in New York. The defendant is a Texas resident. The plaintiff's complaint alleges that it is the legal successor of Agency Sports Management (ASM), with whom the defendant had a written representation agreement starting in 2008. The written representation agreement expired in 2010. In 2012, the defendant allegedly retained the plaintiff to help him find employment as a basketball coach at a Texas university. The defendant was supposed to pay the plaintiff four percent of any compensation that he received from the university. The plaintiff does not allege whether its purported agreement with Johnson was written or oral, and attaches to the complaint only the expired agreement between Johnson and ASM. The complaint alleges that the defendant has failed to pay the four percent commission and asserts causes of action for breach of contract, account stated, accounting, quantum meruit, and unjust enrichment.

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]). The plaintiff 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.

New York Courts may exercise jurisdiction over non-residents under either CPLR §301, which may convey general jurisdiction, or under the long-arm statue contained in CPLR §302, which provides for jurisdiction predicated on sufficient minimum contacts with New York (*see McGowan v. Smith*, 52 NY2d 268, 272 [1981]).[1] The plaintiff mainly argues that the defendant is subject to long-arm jurisdiction in New York because the defendant transacted business in New York by negotiating representation with a New York company.

With respect to long-arm jurisdiction, CPLR §302(a)(1) provides that New York courts may exercise personal jurisdiction over a nondomiciliary if the nondomiciliary has purposefully transacted business within the state and there is "a substantial relationship between the transaction and the claim asserted" (*Paterno v Laser Spine Inst.*, 24 NY3d 370, 376 [2014]). Purposeful activities within the state are volitional acts by which the non-domiciliary "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]; *quoting McKee Elec. Co. v Rauland-Borg Corp.*, 20 NY2d 377, 382 [1967]). The defendant does not need to ever be physically present in the state to confer jurisdiction. When a nondomiciliary seeks out and initiates contact with New York, solicits business in New York, and establishes a continuing relationship, the nondomiciliary can be considered to have transacted business in New York within the meaning of CPLR §302(a)(1).

The plaintiff contends that the totality and quality of the defendant's contacts with New York permit this court to exercise jurisdiction over the defendant for all claims that are related to those contacts. The Court disagrees. The plaintiff claims that, in furtherance of his coaching activities and business affairs, the defendant subjected himself to New York's jurisdiction by engaging a New York agency to represent him and by engaging in frequent e-mails and telephone calls with his New York based representative; however, the plaintiff has no firsthand knowledge of the defendant's alleged contacts with New York. The plaintiff no longer employs the representative who handled the defendant's account, Jordan Bazant. There is no affidavit from Mr. Bazant, or from anyone else with personal knowledge, that confirms the plaintiff's claim that the defendant engaged in frequent email and phone calls with Mr. Bazant or any other plaintiff's representative who was located in New York. Instead, the plaintiff has submitted an affidavit from one of its officers, Michael Principe, who admits that he has no personal knowledge of Mr. Bazant's communications with the defendant while in New York. His affidavit relies on call logs, allegedly put together by Mr. Bazant, that purport to show that Mr. Bazant intended to call the defendant on certain occasions. The call logs refer to three dates in September 2014 and one date in March 2015. They have not been properly authenticated as a business record, and there is no proof whether or where the calls actually took place. The Principe affidavit is hearsay, lacking in any proper foundation or supporting documents.

[1] Here, the Court does not have general jurisdiction over the defendant; the plaintiff has not alleged any facts that would support such a claim. Not only has the defendant never lived, worked, or owned property in New York, he has not conducted business in the state in such a continuous and systematic manner to warrant a finding of his presence in this jurisdiction (id.).

Even if the Court were to accept Mr. Principe's affidavit, it would be insufficient to establish that this Court could properly exercise long-arm jurisdiction over the defendant. The fact that the defendant may have had some telephone conversations with Mr. Bazant, who happened to be employed by an agency located in New York, does not establish that the defendant purposefully availed himself of the privileges of conducting business in New York to subject himself to long-arm jurisdiction. Telephonic or electronic contacts with New York that are limited or isolated in nature are insufficient to confer jurisdiction under CPLR §302(a)(1) (*see e.g., Paterno*, 24 NY3d at 378; *Arouh v Budget Leasing, Inc.*, 63 AD3d 506 [1st Dept 2009]; *Edelman v Taittinger, S.A.*, 298 AD2d 301, 302 [1st Dept 2002]; *Professional Personal Mgt. Corp. v Southwest Med. Assoc.*, 216 AD2d 958 [4th Dept 1995]; *Success Mtkg. Elecs. v Titan Sec.*, 204 AD2d 711, 712 [2d Dept 1994]). It is the quality of the contacts, not the quantity, that is the primary consideration (*see Fishbarg*, 9 NY3d at 382). In order to subject the defendant to suit in New York, the plaintiff must demonstrate that the defendant initiated and pursued negotiations with the plaintiff's employee in New York (*see e.g., Fishbarg*, 9 NY3d at 375; *Deutsche Bank Sec., v Montana Bd. of Invs.*, 7 NY3d 65, 71[2006]; *Parke-Bernet Galleries v Franklyn*, 26 NY2d 13, 17-18 [1970]). Here, there is no evidence that the defendant purposefully sought the services of an entity located in New York. The call logs submitted by the plaintiff show only four telephone calls between Bazant and Johnson over a course of two years. There is no indication from the plaintiff's documentation that the defendant initiated any of those calls. By contrast, the defendant has submitted an affidavit in which he claims his communications with Mr. Bazant consisted of infrequent telephone calls and minimal, if any, e-mail communications with Mr. Bazant. Moreover, the defendant claims that most of the calls with Bazant were to and from Bazant's cell phone, and that Mr. Bazant may not have even been present in New York during those phone calls. At best, the plaintiff has shown only that the defendant occasionally communicated with Bazant, who was employed by a New York agency, concerning transactions that had nothing to do with New York. This is an insufficient basis for the Court to assert jurisdiction.[2]

The plaintiff also claims that the defendant invoked the benefits of New York's agency laws by hiring a New York agent, and therefore subjected himself to jurisdiction in New York. This argument is without merit. In order to subject an out-of-state defendant to jurisdiction in New York based on the actions of a New York agent, the agent must have engaged in purposeful activities in New York for the benefit of, and with the knowledge and consent of, the defendant, and the defendant must have exercised control over the agent (*see Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]; *Coast to Coast*, 149 AD3d at 486-487). The plaintiff has not alleged that it performed any purposeful activities in New York. The employment agreement for

[2] Contrast this with the situation in *Fishbarg*, a case cited by and relied upon by the plaintiff. In *Fishbarg*, the defendants who were residents of California, engaged the services of plaintiff, a New York attorney, to represent them in an action in federal court in Oregon. Over the course of nine months, defendants spoke with the New York attorney by telephone at least 75 times, sent emails to the firm at least 31 times and also sent the New York firm documents on several occasions. The Court of Appeals found that the defendants' retention and initiation of regular communications with a New York firm established a continuing attorney client relationship and constituted a sufficient ground for long-arm jurisdiction under CPLR § 302(a)(1) (*Fishbarg*, 9 NY3d at 380-382).

which the plaintiff seeks recovery was negotiated and performed in Texas. Moreover, the plaintiff has not alleged that the defendant exercised control over the plaintiff's activities.

The motion to dismiss is granted and the complaint is hereby dismissed due to lack of personal jurisdiction.

Dated: June 13, 2018

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