

CBS Inc v Floors Today LLC

2018 NY Slip Op 33724(U)

February 22, 2018

Supreme Court, Kings County

Docket Number: 501384/2016

Judge: Carl J. Landicino

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 22nd day of February, 2018.

P R E S E N T: HON. CARL J. LANDICINO, JSC
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CBS INC D/B/A CBS TELEVISION STATIONS GROUP,

Plaintiff,

Index No.: 501384/2016

- against -

DECISION AND ORDER

MOTION SEQ.#1

FLOORS TODAY LLC D/B/A BIG BOB'S FLOORING,

Defendant(s).

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Motion/Cross Motion and	
Affidavits (Affirmations) Annexed.....	1/2,
Opposing Affidavits (Affirmations).....	3
Reply Affidavits (Affirmations).....	4

After oral argument and upon review of the papers, the Court finds as follows:

This action was commenced by the filing of a Summons and Verified Complaint on February 1, 2016 by CBS Inc. D/B/A CBS Television Stations Group, (hereinafter "Plaintiff") against Floors Today LLC, D/B/A Big Bob's Flooring (hereinafter "Defendant") for alleged non-performance by Defendant of an alleged agreement of the parties. The Defendant interposed an answer on February 29, 2016 acknowledging that the parties entered into an agreement to do business but contends that the Plaintiff failed to perform and therefore the Defendant has stated a counterclaim alleging that the Defendant is entitled to non-performance damages caused by the Plaintiff.

Defendant now moves (motion sequence #1) for an Order pursuant to CPLR §3211(a)(8) dismissing Plaintiff's action and granting such other further relief as this Court may deem just and proper. Defendant argues that because it is a "limited liability company duly formed pursuant to the laws of Massachusetts, does not have an office in New York, does not conduct business in New York, has no other contacts with New York, and engaged in the transaction at issue merely by phone from their principal office in Auburn, Massachusetts", that this Court lacks personal jurisdiction over the Defendant. Additionally, Defendant avers that because there is no written contract "governing the specific transaction" separate from the Credit Application/Agreement document¹ that was "silent on the issues of governing law and jurisdiction over the Defendant" it has not subjected itself to this jurisdiction.

Plaintiff opposes the motion arguing that it should be denied in its entirety and that Plaintiff be allowed to proceed. Specifically Plaintiff avers that the Defendant availed itself of this jurisdiction by creating a business relationship between the parties and therefore Defendant's motion should be denied as jurisdiction was established pursuant to CPLR §302(a). CPLR §302(a) reads as follows:

"(a) 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; or

2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or

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." CPLR §302. Personal Jurisdiction by acts of non-domiciliaries.

¹Contained in Defendant's Motion Exhibit A and Plaintiff's Motion Exhibit 1. Only Plaintiff's Exhibit 1 includes a third page of the document which is entitled "Standard Terms and Conditions". Neither version appears to contain a Choice of Forum Clause.

“As the party seeking to assert personal jurisdiction, the plaintiff bears the ultimate burden of proof on this issue.” *Coll. v. Brady*, 84 A.D.3d 1322, 1323, 924 N.Y.S.2d 529, 531 [2nd Dept, 2011]. “When opposing a motion to dismiss a complaint pursuant to CPLR 3211(a)(8) on the ground that discovery on the issue of personal jurisdiction is necessary, plaintiffs need not make a *prima facie* showing of jurisdiction, but instead ‘need only demonstrate that facts ‘may exist’ to exercise personal jurisdiction over the defendant.” *Daniel B. Katz & Associates Corp. v. Midland Rushmore, LLC*, 90 A.D.3d 977, 978, 937 N.Y.S.2d 236, 238–39 [2nd Dept, 2011], quoting *Ying Jun Chen v. Lei Shi*, 19 A.D.3d 407, 796 N.Y.S.2d 126 [2nd Dept, 2005] *see also Rajpurohit v. Rajpurohit*, 122 A.D.3d 706, 708, 996 N.Y.S.2d 326, 328 [2nd Dept, 2014]. To successfully oppose a motion made pursuant to CPLR 3211(a)(8) the opponent must “offer ‘some tangible evidence which would constitute a ‘sufficient start’ in showing that jurisdiction could exist, thereby demonstrating that its assertion that a jurisdictional predicate exists is not frivolous.” *SNS Bank, N.V. v. Citibank, N.A.*, 7 A.D.3d 352, 354, 777 N.Y.S.2d 62, 64 [1st Dept, 2004], quoting *Mandel v. Busch Entm't Corp.*, 215 A.D.2d 455, 626 N.Y.S.2d 270 [2nd Dept, 1995].

Turning to the merits, Plaintiff has provided as Exhibit 1 in its opposition papers the CBS Television Stations application completed by the Defendants. This application provides an address for Plaintiff of “1700 Broadway New York, NY 10019²”. This notwithstanding, the Plaintiff has annexed “Standard Terms and Conditions” (Part of Plaintiff’s Exhibit 1) that contains no Choice of Forum Clause. Additionally, the documentation provided reflects that the payments that Defendant made to Plaintiff (Plaintiff’s Exhibit 4) were sent by the Defendant to “CBS Television Stations”, in Newark, New Jersey³. Furthermore neither party has provided any further agreement or contract made for the services allegedly provided.

²The application also provides a New York phone number and fax number as follows:
“Phone: (212) 975-4321 FAX (212) 664-0131”

³CBS Television Stations P.O. Box 33091 Newark, NJ 07188-0091

[* 4]

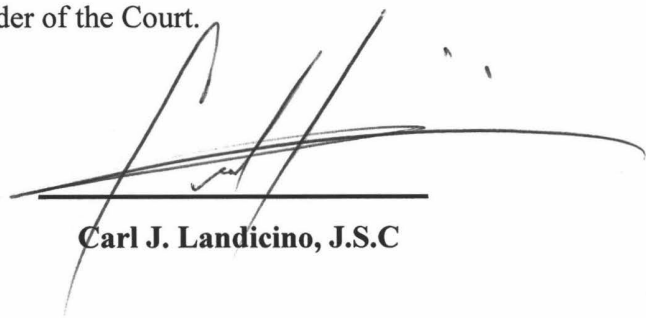
Accordingly, while jurisdiction has not been established, the Plaintiff is only tasked with demonstrating that there are facts that may exist to establish jurisdiction over the Defendant. Plaintiff provided evidence constituting a ‘sufficient start’ in showing that jurisdiction could exist, thereby demonstrating that its assertion that a jurisdictional predicate exists is not frivolous.” *SNS Bank, N.V. v. Citibank, N.A.*, 7 A.D.3d 352, 354, 777 N.Y.S.2d 62, 64 [1st Dept, 2004], quoting *Mandel v. Busch Entm't Corp.*, 215 A.D.2d 455, 626 N.Y.S.2d 270 [2nd Dept, 1995].

The Court in exercising its discretion may “postpone the resolution of the issue of personal jurisdiction.” CPLR §3211(d)⁴; *Daniel B. Katz & Associates Corp. v. Midland Rushmore, LLC.*, 90 A.D.3d 977, 937 N.Y.S.2d 236 (2d Dept. 2011). Accordingly the Court may deny such motion without prejudice to renew upon the completion of discovery in relation to the issue of personal jurisdiction, pursuant to CPLR §3211(d). *Expert Sewer & Drain, LLC v. New England Municipal Equipment Company, Inc.*, 106 A.D.3d 775, 964 N.Y.S.2d 596 (2d Dept. 2013); see, *Ying Jun Chen v. Lei Shi*, 19 A.D.3d 407, 796 N.Y.S.2d 126 (2d Dept. 2005).

Based upon the foregoing, it is hereby ORDERED as follows:

Defendant’s motion for dismissal pursuant to CPLR §3211(a)(8) is denied without prejudice with leave to renew upon completion of discovery on the issue of personal jurisdiction pursuant to CPLR §3211(d). The foregoing constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C

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⁴CPLR §3211(d) provides as follows: “(d) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing moving party to assert the objection in his responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just.”