SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN **PART** IAS MOTION 33EFM
Justice

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GRONICH & COMPANY, INC.,

Petitioner,

- v -

SIMON PROPERTY GROUP, INC., SIMON PROPERTY GROUP L.P., THE RETAIL PROPERTY TRUST, LONGSTREET ASSOCIATES L.P.

Respondents.

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INDEX NO. 653263/2016

MOTION DATE

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 124, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135

were read on this motion to/for TURNOVER PROCEEDING.

Petitioner, Gronich & Company, Inc., brings the instant turnover proceeding pursuant to CPLR §5225(b) seeking to collect the judgment in the amount of $2,540,337.19 from the above-named respondents. Respondents move to dismiss the petition arguing, among other things, for lack of personal jurisdiction.

Factual Background

Petitioner is a broker that is owed a commission from a lease renewal between tenant FAO Schwarz and landlord/owner Longstreet Associates LP (Longstreet) at the building known as the General Motors or the GM Building located at 767 Fifth Avenue, in the city, state, and county of New York. Petitioner successfully sued Longstreet for the unpaid commission and was awarded a judgment against Longstreet.

In the underlying action that gave rise to petitioner's judgment, petitioner acted as the broker for the lease entered into in 1985 between FAO Schwarz, as tenant, and Longstreet, as owner (Lease). As part of subsequent amendments made to the Lease, FAO Schwarz and Longstreet entered into a commission agreement wherein petitioner would be entitled to commission if certain preconditions, such as renewal of the Lease, were met. Those conditions were met, and petitioner commenced an action seeking the amount of the commission, claiming that it was entitled to a brokerage commission in connection with the renewal and extension of the Lease. In an order dated April 29, 2015, the court granted petitioner's motion

for summary judgment on its claim, and awarded it the amount of $1,890,000, plus interest, against Longstreet,[1] which the Appellate Division affirmed in June 2016 (*Gronich v Longstreet Assoc. LP*, 140 AD3d 395 [1st Dept 2016]).

At the time the Lease was entered into, Longstreet was a subsidiary of a company named Corporate Property Investors (CPI). Another company, CPI-767 Corporation, was a wholly owned subsidiary of CPI and also the general partner of Longstreet from 1996 until CPI-767's dissolution in 2006.

In 1998, CPI entered into an Agreement and Plan of Merger dated February 18, 1998 (Merger Agreement) with Simon DeBartolo Group, Inc. (SDG) and Corporate Realty Consultants, Inc. (CRC). As a result of the merger, CPI was renamed SPG, Inc., and Simon DeBartolo Group, LP was renamed SPG, LP.

Under section 6.18(a) of the Merger Agreement, prior to the merger, Longstreet was directed to sell the GM Building. Petitioner alleges, and respondents deny, that proceeds of the sale, in the amount of $782,024,000, were transferred to SDG as a part of the merger. Under section 6.18(b), CPI was required to deliver all of its assets and subsidiaries to SDG. Petitioner now seeks to enforce its judgment against the Simon respondents.

Discussion

The Simon Respondents-Personal Jurisdiction

The Simon respondents argue that this court lacks personal jurisdiction over it. The Simon respondents' objection to jurisdiction places the burden on petitioner to prove otherwise (*see Aybar v Aybar*, 169 AD3d 137 [2d Dept 2019]).

1) General Jurisdiction

At the outset, no general jurisdiction exists over the Simon respondents, since they are not incorporated in New York and do not have their principal place of business in the state (CPLR 301; *Magdalena v Lins*, 123 AD3d 600, 601 [1st Dept 2014]). Petitioner also fails to demonstrate that that exceptional circumstances exist to deem the Simon respondents essentially at home in New York. In *Daimler v Bauman*, the Supreme Court indicated that an "exceptional case" exists where a corporate defendant's operations in another state were "so substantial and of such a nature as to render the corporation at home in that State" (*Daimler v Bauman*, 571 US 117, 138-39, n. 19; *see Brown v Lockheed Martin Corp.*, 814 F3d 619, 629 [2d Cir 2016] [holding that when a corporation is neither incorporated nor maintains its principal place of business in a state, mere contacts, no matter how "systematic and continuous," are extraordinarily unlikely to add up to an "exceptional case"]).

[1] *Gronich & Co., Inc. v Longstreet Associates L.P.*, 2015 WL 1549059 (Sup Ct N.Y. County 2015).

The Supreme Court noted that its decision in *Perkins v. Benguet Consolidated Mining Co.* (342 US 437 [1952]) provided an example of an "exceptional case."

In *Perkins*, defendant corporation, which was incorporated under the laws of the Philippines, was forced to relocate from the Philippines to Ohio due to war. Defendant corporation's "[p]resident moved to Ohio, where he kept an office, maintained the company's files, and oversaw the company's activities" (*Daimler*, at 128-29). The Supreme Court held that Ohio had general jurisdiction over defendant corporation because the corporation's operations in Ohio was "so substantial and of such a nature as to render the corporation at home in that State" (*id.*).

Further elucidating the standard articulated in *Daimler*, the Second Circuit has held that order to determine the extent of a corporation's contacts with a state for general jurisdiction purposes, the court must "assess the company's local activity not in isolation, but in the context of the company's overall activity: the general jurisdiction inquiry 'does not focus solely on the magnitude of the defendant's in-state contacts,' but 'calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide' " (*Brown v Lockheed Martin Corp.*, 814 F3d 619 [2d Cir 2016], quoting *Daimler*, 571 US at 139 n. 20).

Petitioner alleges a number of contacts the Simon respondents maintained with New York, including: the Simon respondents' office location in Manhattan, which petitioner claims is the center of their leasing operations; the Simon respondents' operation of eight shopping malls in New York State; the Simon respondents' New York office's hiring of executives to work in New York; SPG, Inc.'s Senior Vice President's location in New York; and SPG, Inc. and SPG, LP's utilization of New York courts.

However, despite petitioner's showing, this court lacks general jurisdiction over the Simon respondents. Petitioner does not, as it is required to, address the Simon respondents' contacts with New York in the context of their conduct throughout the United States or the World. In fact, to its detriment, petitioner acknowledges that the Simon respondents maintain "large global foot print" (NYSCEF doc no 117 at 15) and that that they are one of "this country's, if not the world's, largest real estate operators with mall properties in 37 states and the District of Columbia" (NYSCEF doc no 84, ¶11).

In any event, petitioner's allegations demonstrate that the Simon respondents, at most, maintained a presence in New York, not that it was it was "essentially at home" in the state or that New York was "a surrogate for the place of incorporation or head office" (*Daimler*, 571 US at 130, n. 8; *Sonera Holding B.V. v Cukurova Holding A.S.*, 750 F3d 221, 226 [2d Cir 2014] [holding that "engage[ment] in a substantial, continuous, and systematic course of business" is, on its own, insufficient to render it at home in a forum]). Clearly, the Simon respondents'

operations in New York are not akin to *Perkins*, where the highest level of decision-making authority within the corporation defendant rested in Ohio, rendering it at home in that state (*see also Gucci America, Inc.* 768 F3d 122 [2d Cir 2014] [holding branch offices of bank incorporated and headquartered elsewhere insufficient to establish personal jurisdiction]; *Aybar,* 169 AD3d 137 [finding that Ford's extensive commercial activities in New York with one factory employing 600 people is not at home in New York when compared to its 62 plants, 187,000 employees, and 11,980 dealerships worldwide]).

Further, the Simon respondents' registration to do business with New York state is insufficient to confer general jurisdiction. In *Brown*, the Second Circuit determined that conferring general jurisdiction on the basis of "mere registration and the accompanying appointment of an in-state agent—without an express consent to general jurisdiction. . . , every corporation would be subject to general jurisdiction in every state in which it registered, and *Daimler*'s ruling would be robbed of meaning by a back-door thief" (*Brown v Lockheed Martin Corp.*, 814 F3d 619, 640 [2d Cir 2016]; *see, e.g., Sae Han Sheet Co. v Eastman Chemical, Corp.*, 2017 WL 4769394 [S.D.N.Y. Oct. 19, 2017]; *Famular v. Whirlpool Corp.*, 2017 WL 2470844 [S.D.N.Y. June 7, 2017]; *Taormina v Thrifty Car Rental*, 2016 WL 7392214 [S.D.N.Y. Dec. 21, 2016]; *Kyowa Seni, Co. v ANA Aircraft Technics, Co.*, 60 Misc. 3d 898, 904 [Sup Ct N.Y. County 2018]). Petitioner's citation to New York Business Corporation Law § 1304 is unavailing, since it does not expressly require a corporation to consent to jurisdiction to do business within the state. Petitioner's citation to *B&M Kingstone, LLC v Mega Intl. Commercial Bank Co., Ltd.* (131 AD3d 259 [1st Dept 2015]), in support of its argument that a corporation consents to jurisdiction by registering to do business in the state is inapposite, since in that case, the defendant consented to the necessary regulatory oversight in return for permission to operate in New York.

2) Specific jurisdiction

CPLR 302(a)(1) "permits a New York court to exercise 'long-arm" personal jurisdiction over a nondomiciliary defendant if the defendant transacted business within the state, and the cause of action arose from that transaction (*Copp v Ramirez*, 62 AD3d 23 [1st Dept 2009]). Under the statute, "proof of one transaction in New York is sufficient to invoke jurisdiction . . . so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" (*Kreutter v. McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]). At the very least, there must be " 'a relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former, regardless of the ultimate merits of the claim" ' (*D&R Global Selections. S.L. v Bodega Olegario Falcon Pineiro*, 29 NY3d 292, 298-299 [2017], quoting *Licci v Lebanese Can. Bank, SAL*, 20 NY3d 327, 339 [2012]; *see Talbot v. Johnson Newspaper Corp.*, 71 NY2d 827, 829 [1988] [personal jurisdiction under

this section exists if it is established that "the nondomiciliary conducts 'purposeful activities' within the state and the claim against the nondomiciliary involves a transaction bearing a 'substantial relationship' to those activities"]). "If either prong of the statute is not met, jurisdiction cannot be conferred" (*Copp*, 62 AD3d at 29, quoting *Johnson v. Ward*, 4 N.Y.3d 516, 519 [2005]). Indeed, "[J]urisdiction is not justified where the relationship between the claim and transaction is too attenuated" (*Johnson*, 4 NY3d at 520).

For a turnover proceeding under CPLR § 5225(b), "the entity must have actual, not merely constructive, possession or custody of the assets sought." (*Commonwealth of the Northern Mariana Islands v Canadian Imperial Bank of Commerse*, 21 NY3d 55, 57 [2013]; *see also, Beauvais v. Allegiance Sec., Inc.*, 942 F2d 838, 840 [2d Cir 1991]). CPLR § 5225(b) speaks only to the "possession or custody," not the control of the judgment debtor's assets (*Commonwealth of the Northern Mariana Islands*, 21 NY3d at 60).

Here, petitioner is unable to establish a substantial relationship between the merger and the instant action. The essence of petitioner's claim is that the merger resulted in the Simon respondents' possession of proceeds from the sale of the GM Building for use as a "Merger Dividend" (NYSCEF doc no 84, ¶¶56, 64, 80). Petitioner contends that the transfer of Longstreet's assets, including the proceeds from the sale of the GM Building, to the Simon respondents triggers liability under section 5225(b). However, while petitioner acknowledges that CPI's shareholders received the proceeds from the sale of the GM Building, petitioner is unable to show that the Simon respondents actually received the proceeds as part of the merger.

Section 6.18(b) of the Merger Agreement, which states that CPI is to transfer all of its assets to SDG, LP, does not provide a basis for the court to determine that the Simon respondents were ever in possession of the proceeds from the sale of the GM Building, and it does not state that SDG, LP was to receive the proceeds from the sale of the GM Building. Further, the cited portions of SPG's 1998 Annual Report does not establish that the Simon respondents received proceeds from the sale of the GM building (NYSCEF doc no 7 at 7 and 59). Nor does it state that CPI's shareholders are to receive a dividend after the merger. Moreover, the fact that SPG included the proceeds from the GM Building sale in its August 13, 1998 S-4 form does not decisively establish that the Simon respondents received any proceeds from the GM Building sale (NYSCEF doc no 16).

Petitioner also argues that a turnover order should be granted since SDG controlled and directed the transaction for the sale of the GM Building. By itself, control over property is insufficient to establish entitlement to a turnover order under section 5225(b) (*Commonwealth of N. Mariana Islands v Canadian Imperial Bank of Commerce*, 21 NY3d 55, 60-63 [2013]).

Petitioner's contention that jurisdiction exists under CPLR 302(a)(4) also fails, since none of the Simon respondents owned, operated or possessed the GM Building.

Accordingly, as petitioner is unable to demonstrate that this court has personal jurisdiction over the Simon respondents, the petition is dismissed as against them.[2]

Longstreet

The petition is also dismissed as against Longstreet. The section cited by petitioner as the basis for relief applies to property allegedly not in possession of the judgment debtor — Longstreet. Petitioner has already obtained a judgment against Longstreet in the underlying action and is seeking to collect that judgment from the Simon respondents. Accordingly, the petition is dismissed as against Longstreet.

Conclusion

Accordingly, it is hereby

ORDERED and **ADJUDGED** that the relief sought in the petition is denied, and the petition is dismissed; it is further

ORDERED that counsel for petitioner shall serve a copy of this order with notice of entry upon all parties within ten (10) days of entry.

This constitutes the decision and order of the Court.

4/2/2019
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE

[2] Even if petitioner were able to establish that the court has jurisdiction over its claims, its application would still be denied, since petitioner fails to establish that the Simon Respondents had possession of the proceeds from the GM Building sale (*see* CPLR §5225[b]).