

Ashley v Red Lobster Hospitality LLC

2019 NY Slip Op 31824(U)

April 26, 2019

Supreme Court, New York County

Docket Number: 160442/2018

Judge: John J. Kelley

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

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INDEX NO. 160442/2018

DWAYNE ASHLEY,

MOTION DATE 01/03/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

RED LOBSTER HOSPITALITY LLC, and GOLDEN GATE CAPITAL, INC.

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to/for DISMISSAL

I. Introduction

In this action to recover damages for personal injuries arising from a trip-and-fall accident at a Red Lobster restaurant in Copiague, the defendant Golden Gate Capital, Inc. (the corporation), moves pursuant to CPLR 3211(a)(8) to dismiss the complaint against it for lack of long-arm personal jurisdiction. It also moves for summary judgment dismissing the complaint as against it on the ground that it did not own, manage, or have an obligation to maintain the restaurant and that it thus cannot be held liable for the torts of Red Lobster Hospitality, LLC (Red Lobster), a limited liability company that is merely its subsidiary. The plaintiff opposes the motion. That branch of the motion seeking to dismiss the complaint against the corporation for lack of jurisdiction is granted and the motion is otherwise denied.

II. Background

The corporation is a holding company and the parent of its subsidiary, Red Lobster. The corporation is incorporated in California, has its principal place of business in San Francisco, and is not registered to do business in New York. The plaintiff attempted to serve process upon an unrelated entity known as Golden Gate Capital, LLC, by delivery of the summons and

complaint to the New York State Secretary of State; the plaintiff also served process upon the corporation by personal delivery of the summons and complaint to an officer of the corporation in San Francisco.

The corporation submits the affidavit of one of its officers, who explains that the corporation is a holding company that does not conduct any business in New York, owns no property in New York, and does not oversee the management or operations of Red Lobster.

III. Discussion

Where a motion to dismiss is based on lack of personal jurisdiction, the plaintiff bears the ultimate burden of proving a basis for such jurisdiction (*see Peterson v Spartan Indus*, 33 NY2d 463 [1976]; *Carrs v Avco Corp.*, 124 AD3d 820 [2d Dept 2015]; *Cotia (USA) Ltd. v Lynn Steel Corp.*, 134 AD3d 483 [1st Dept 2015]). Although service of process upon the corporation's officer in San Francisco would be sufficient to obtain jurisdiction over it were it subject to the long-arm jurisdiction of the New York courts, the plaintiff failed to establish that New York courts have long-arm jurisdiction over the corporation. The corporation has shown with its affidavit that it had and has no contacts whatsoever with New York, in that it does not reside here, but in California, and that it has not availed itself of commercial amenities or facilities in New York. In opposition, the plaintiff has not sustained its ultimate burden of showing that the corporation "transacted business" in New York within the meaning of CPLR 302, committed a tort in New York, or may be subject to jurisdiction for its subsidiary's commission of a tort on a piercing-the-corporate veil theory. Nor has the plaintiff shown that the corporation "does business" in New York under the general jurisdiction provisions of CPLR 301, or that it may be sued in New York in this action without depriving it of due process.

A. CPLR 302

Pursuant to the "specific jurisdiction" provisions of CPLR 302(a), a non-domiciliary defendant is subject to personal jurisdiction in New York where it "transacts any business within the state or contracts anywhere to supply goods or services in the state" (CPLR 302[a][1]). It

may also be subject to specific jurisdiction under CPLR 302(a)(2) where it “commits a tortious act within the state.”

1. CPLR 302(a)(1)—Transacting Business

A defendant is considered to have transacted business where it “projects [it]self into this state to engage in a sustained and substantial transaction of business” or “seeks out and initiates contact with New York, solicits business in New York, and establishes a continuing relationship” (*Paterno v Laser Spine Inst.*, 24 NY3d 370, 377 [2014]; see *D&R Global Selections, S.L. v Bodega Olegario Falcon Pineiro*, 29 NY3d 292 [2017]). “To determine the existence of jurisdiction under section 302(a)(1), a court must decide (1) whether the defendant ‘transacts any business’ in New York and, if so, (2) whether this cause of action ‘[arises] from’ such a business transaction” (*Best Van Lines, Inc. v Walker*, 490 F3d 239, 246 [2d Cir 2007]; see *Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71 [2006]). Thus, contrary to the plaintiff’s contention, one transaction unrelated to his cause of action is insufficient to confer jurisdiction over a nondomiciliary corporation under CPLR 302(a)(1). Rather,

“[i]t is not enough that a non-domiciliary defendant transact business in New York to confer long-arm jurisdiction. In addition, the plaintiff’s cause of action must have an ‘articulable nexus’ or ‘substantial relationship’ with the defendant’s transaction of business here. 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 at 298-299, quoting *Licci v Lebanese Can. Bank, SAL*, 20 NY3d 327, 339 [2012]). In order to invoke long arm jurisdiction under CPLR 302(a)(1), the plaintiff must show that the defendant purposely availed itself of commercial amenities or facilities in New York (see *Licci v Lebanese Can. Bank, SAL*, 20 NY3d at 339). “Purposeful activities” 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 (*Paterno v Laser Spine Inst.*, 24 NY3d at 376). Moreover, “it is not necessarily who initiated contact that is determinative, but rather, the nature and quality of the

contacts and the relationship established as a result" (*Grimaldi v Guinn*, 72 AD3d 37, 51 (2d Dept 2010)).

The plaintiff submits no proof that the corporation directly transacted business in New York, or that whatever business that it did transact gave rise to his cause of action; rather, the plaintiff asserts only that the corporation transacts business through its subsidiary, Red Lobster, an entity that does transact business in New York, by virtue of an ownership interest in that limited liability company. This is insufficient to establish in personam long-arm jurisdiction under CPLR 302(a)(1) (*see Moreau v RPM, Inc.*, 20 AD3d 456 [2d Dept 2005]).

2. CPLR 302(a)(2)---Commission of Tort in New York

The plaintiff alleges, in effect, that the court also has long-arm jurisdiction over the corporation because it committed a tortious act in New York, insofar as it may be liable for Red Lobster's negligence in the management of maintenance of the restaurant. It is well settled that there is a presumption of corporate separateness between parent and subsidiary entities (*see Meshel v Resorts Intl. of N.Y., Inc.*, 160 AD2d 211 [1st Dept 1990]). As a general rule, a parent corporation is not liable for the acts of a subsidiary (*see McCloud v Bettcher Indus., Inc.*, 90 AD3d 1680, 1681 [4th Dept 2011]). "[T]he existence of an agency upon which a finding of jurisdiction may be predicated may not be inferred from the mere existence of a parent-subsidiary relationship" (*Insurance Co. of N. Am. v EMCOR Group, Inc.*, 9 AD3d 319, 320 [1st Dept 2004]; *see Frummer v Hilton Hotels Intl.*, 19 NY2d 533, 538 [1967]). Indeed, liability can never be predicated solely upon the fact that a parent corporation owns a controlling interest in the shares of its subsidiary (*see Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 163 [1980]; *McCloud v Bettcher Indus., Inc.*, 90 AD3d at 1681; *Lowendahl v Baltimore & O.R.C.*, 247 App Div 144, 155 [1st Dept 1936], *affd* 272 NY 360 [1936]). Even complete ownership of a subsidiary's stock is insufficient, by itself, to pierce the corporate veil (*see Oxbow Calcining USA, Inc. v American Indus. Partners*, 96 AD3d 646, 649 [1st Dept 2014]).

For the purposes of tort liability, courts may only disregard the separate legal identities of the parent and subsidiary corporation if the parent intervenes in the subsidiary's management so thoroughly as to ignore the subsidiary's paraphernalia of incorporation, directors, and officers (see *Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152 [1980]; *Dempsey v Intercontinental Hotel Corp.*, 126 AD2d 477, 478 [1st Dept 1987]). In other words, "[a] parent company will not be held liable for the torts of its subsidiary unless it can be shown that the parent exercises complete dominion and control over the subsidiary" (*Broxmeyer v United Capital Corp.*, 79 AD3d 780, 784 [2d Dept 2010], quoting *Serrano v New York Times Co., Inc.*, 19 AD3d 577, 578 [2d Dept 2005]).

Inasmuch as the corporation cannot be held responsible for Red Lobster's torts, the corporation has not committed a tort in New York that would subject it to long-arm jurisdiction.

B. CPLR 301 and Due Process

In addition, the contacts alleged by the plaintiff are insufficient to establish general jurisdiction over the corporation to satisfy constitutional due process protections. "[T]he constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum state" (*Burger King v Rudzewicz*, 471 US 462, 474 [1985], citing *International Shoe Co. v Washington*, 326 US 310, 316 [1945]; see *D&R Global Selections, S.L. v Bodega Olegario Falcon Pineiro*, 29 NY3d 292 [2017]). Thus, a court may assert general jurisdiction over a foreign corporation to hear any and all claims against it pursuant to CPLR 301 only when the corporation's or individual's affiliations with New York are so constant and pervasive as to render them essentially "at home" here (see *Daimler AG v Bauman*, 571 US 117 [2014]; see also *BNSF Ry. v Tyrell*, ___ US ___, 137 Sct 1549 [2017]; *D&R Global Selections, S.L. v Bodega Olegario Falcon Pineiro*, 29 NY3d 292 [2017]). Those contacts and affiliations are absent here.

The mere presence of a subsidiary in New York does not establish the parent corporation's presence for the purposes of the long-arm statute. Rather, as with the substantive

issue of tort liability, it must be shown that the parent exercises such complete control over the subsidiary that the latter is, in fact, merely a “department” of the parent (see *Wolberg v IAI N. Am., Inc.*, 161 AD3d 468, 468 [1st Dept 2018]; see also *Jazini v Nissan Motor Co., Ltd.*, 148 F3d 181 [2d Cir 1998]; *Benifits By Design Corp. v Contractor Mgt. Servs., LLC*, 75 AD3d 826 [3d Dept 2010]). Where, as here, the parent is a holding company, proof of such control is necessarily lacking, inasmuch as a subsidiary cannot be dependent on a holding company for its operations and management; rather, a holding company is financially dependent on its subsidiaries (see *FIA Leveraged Fund Ltd. v Grant Thornton LLP*, 150 AD3d 492, 493 [1st Dept 2017]; *Porter v LSB Indus.*, 192 AD2d 205, 211-212 [4th Dept 1993]).

Even “asserting jurisdiction over a foreign corporation based on the mere registration and the accompanying appointment of an in-state agent by the foreign corporation, without the express consent of the foreign corporation to general jurisdiction, would be ‘unacceptably grasping’ under *Daimler*” (*Aybar v Aybar*, 169 AD3d 137, 152 [2d Dept 2019]). A fortiori, the assertion of jurisdiction an unregistered entity, such as the corporation here, would deprive it of due process in the absence of any proof that it was essentially “at home” in New York.

In *Wolberg*, the Supreme Court denied a foreign corporation’s pre-answer motion pursuant to CPLR 3211(a)(8) to dismiss for lack of jurisdiction. It concluded that the plaintiff, who had previously worked for that corporation and had some knowledge of its operations, sufficiently demonstrated that facts “may exist” (*Peterson v Spartan Indus*, 33 NY2d at 465) as to whether the foreign corporation was owned by the same shareholders as a domestic corporation, that domestic corporation was financially dependent on the foreign corporation, the foreign corporation routinely interfered with the domestic corporation’s hiring practices, and the foreign corporation completely controlled over the domestic corporation’s operational decisions (see *Wolberg v IAI N. Am., Inc.*, 2017 NY Slip Op 31465[U] [Sup Ct, N.Y. County, Nov. 9, 2017]). The court thus allowed discovery to proceed on the issue of whether the domestic corporation was a mere department of the foreign corporation. The Appellate Division reversed, and

dismissed the complaint against the foreign corporation, concluding that, based solely on the foreign corporate officers' affidavits, the defendants "established" that the domestic corporation was not a "mere department" of the foreign corporation, inasmuch as "[t]he key executive personnel of the subsidiary were not assigned to their positions by the foreign parent, the subsidiary trained its own personnel, the parent did not write and publish all of the sales literature used by the subsidiary, and the subsidiary prepared its own financial statements" (*Wolberg v IAI N. Am., Inc.*, 161 AD3d at 468). Thus, contrary to the plaintiff's contention, documentary proof that Red Lobster is a purely separate entity is not required to establish the corporation's entitlement to dismissal. Rather, the corporation is entitled to dismissal solely on the basis of its officer's affidavit establishing that the corporation is separate from Red Lobster. The law is clear that, under the circumstances presented here, discovery on the issue of whether Red Lobster is truly an entity separate from the corporation is not warranted, especially because the plaintiff was unable to articulate a good-faith basis for his contention that discovery would yield any contrary information.

C. Summary Judgment

The corporation's request for summary judgment is premature. CPLR 3212(a) provides that "[a]ny party may move for summary judgment . . . after issue has been joined." In other words, a motion for summary judgment dismissing a complaint presupposes the joinder of issue (*see White House Manor, Ltd. v Benjamin*, 11 NY3d 393 [2008]; *Wittlin v Schapiro's Wine Co.*, 178 AD2d 160 [1st Dept 1991]; *see also Spagnoletti v Chalfin*, 131 AD3d 901 [1st Dept 2015]; *Four Seasons Hotels v Vinnik*, 127 AD2d 310, 320 [1st Dept 1987]). The court declines to treat the corporation's pre-answer motion as one for summary judgment pursuant to CPLR 3211(c) and it is not clear that the plaintiff, through his submissions, demonstrated an intent "deliberately [to] chart[] a summary judgment course" (*Elhannon, LLC v Brenda J. DeLuca Trust*, 108 AD3d 911, 911-912 [3d Dept 2013], quoting *Pilatich v Town of New Baltimore*, 100

AD3d 1248, 1250 [3d Dept 2012]; see *Four Seasons Hotels v Vinnik*, 127 AD2d at 321 [1st Dept 1987]). Hence, that branch of the motion seeking summary judgment is denied.

IV. Conclusion

Accordingly, it is

ORDERED that the motion of the defendant Golden Gate Capital, Inc., is granted to the extent that the complaint is dismissed as against it for lack of in personam long-arm jurisdiction, and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

4/26/2019
DATE



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

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE