

Woods v IHTT, Inc.

2019 NY Slip Op 32146(U)

July 2, 2019

Supreme Court, New York County

Docket Number: 656675/2016

Judge: Gerald Lebovits

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GERALD LEOVITS PART IAS MOTION 7EFM

Justice

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ERIC WOODS,

Plaintiff,

- v -

IHTT, INC., THE MICHAEL BASS GROUP, INC.,
TODD BROCKMAN, and WACO HOOVER,

Defendants.

INDEX NO. 656675/2016
MOTION DATE 03/28/2019
MOTION SEQ. NO. 005

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 97, 98, 99

were read on this motion to

DISMISS

Schillinger & Finsterwald LLP (Peter Schillinger of counsel), and *Baird Quinn, LLC* (Beth Doherty Quinn of counsel), for Plaintiff.
Law Office of Robert Steckman, P.C. (Robert M. Steckman of counsel), for Defendants Todd Brockman and Waco Hoover.

Gerald Lebovits, J.:

Defendants Todd Brockman (Brockman) and Waco Hoover (Hoover, together the Individual Defendants) move, pursuant to CPLR 3211 (a) (8), to dismiss plaintiff's complaint against them based upon lack of personal jurisdiction.

BACKGROUND

Underlying Allegations

Plaintiff alleges in his verified amended complaint (the Amended Complaint, ¶¶ 1, 20, 23, 38, NYSCEF Doc. No. 38) that he sued IHTT, Inc. (IHTT) in Colorado and obtained a judgment in the amount of \$285,102.57 that has been domesticated in New York (*id.*, ¶¶ 23-28). He states that Brockman was IHTT's Chairman and he owns 69.7% of its stock and that Hoover was IHTT's CEO and owned 24.5% of its stock. Plaintiff asserts that they were based in New York as IHTT employees. He further asserts that there were improper financial transactions including the transfer of IHTT assets to Vendome Associates (Vendome) and then to The Michael Bass Group, Inc. (Bass), entities that the Individual Defendants controlled, for the purposes of stripping IHTT of its assets to defraud parties including plaintiff (*id.*, ¶¶ 32-63).

Plaintiff has submitted the deposition testimony of Brockman (Brockman EBT, NYSCEF Doc. Nos. 86, 87) in opposition to the Individual Defendants' motion. He points to Brockman's

statement that IHTT had an office located at 244 Fifth Avenue, New York, New York, that Brockman and Hoover had ownership interests in Vendome and Bass, that they “frequently conduct[ed] and transact[ed] business in New York[,] Constantly” and that Brockman and Hoover were “based in New York.”

The Individual Defendants both state that they were not residents of the State of New York (NYSCEF Doc. Nos. 73, 74). Brockman states that he is a resident of Nevada (Brockman affidavit, ¶ 6, NYSCEF Doc. No. 73) and Hoover states that he is a resident of Texas (Hoover affidavit, ¶ 6, NYSCEF Doc. 74). They note that IHTT sued plaintiff in an action entitled *IHTT, Inc. versus Eric Woods*, Supreme Court, New York County, index number 650311/2013. In an order dated May 7, 2013 (the May 2013 Order, NYSCEF Doc. No. 78), Hon. Eileen Rakower dismissed the action based upon lack of personal jurisdiction. They contend that this establishes that New York does not have personal jurisdiction over the dispute. The Individual Defendants note that plaintiff has not denied that they are not residents of New York and they contend that plaintiff has not shown that they were alter egos of IHTT.

Defendants’ reply affirmation (the Reply, NYSCEF Doc. No. 99) reiterates the arguments made in their motion. The Reply is in affirmation form by the Individual Defendants’ attorney and it does not set forth any facts contesting plaintiff’s showing set forth in the Brockman EBT that the Individual Defendants transacted business in New York “[c]onstantly.”

Dismissal Standard

In determining a motion to dismiss pursuant to CPLR 3211, “the court must accept the facts as alleged in the complaint as true, accord [them] the benefit of every possible favorable inference, and determine . . . whether the facts as alleged fit within any cognizable legal theory” (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005] [internal quotation marks and citation omitted]; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Dismissal based upon documentary evidence is appropriate only where the “documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

However, allegations that are bare legal conclusions or are inherently incredible or that are flatly contradicted by the documentary evidence are not accorded such favorable inferences and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]). Also, “[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Personal Jurisdiction

CPLR 301 is the general jurisdiction statute (*see Ralph Cole Hardware v Ardowork Corp.*, 117 AD3d 561, 561 [1st Dept 2014]; *ABKCO Indus. v Lennon*, 52 AD2d 435, 440 [1st Dept 1976]). “New York courts may not exercise general jurisdiction against a defendant under

the United States Constitution or under CPLR 301 unless the defendant is domiciled in the state or in an exceptional case where an individual's contacts with a forum [are] so extensive as to support general jurisdiction notwithstanding domicile elsewhere" (*IMAX Corp. v Essel Group*, 154 AD3d 464, 466-467 [1st Dept 2017] internal citation and quotations omitted; *see also Magdalena v Lins*, 123 AD3d 600, 601 [1st Dept 2014]).

CPLR 302 (a) provides for personal jurisdiction where a defendant "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 . . . or 3. commits a tortious act without the state causing injury to person or property within the state . . . if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from the goods used or consumed or services rendered, in the state, or (ii) expects or reasonably should expect the act to have consequences in the state and derives revenue from interstate . . . commerce."

Under CPLR 302 (a) (1), both for transacting business and for contracting to supply goods or service, "the defendant must have purposefully availed itself of the privilege of conducting business [in New York] by either transacting business in New York or contracting to supply goods or services in New York [and], the claim must arise from that business transaction or contract to supply good or services The primary consideration is the quality of the non-domiciliary's New York contacts" (*D & R Global Selections, S.L. v Bodega Olegario Falcon Pineiro*, 29 NY3d 292, 297-298 [2017] [internal quotation marks omitted]; *see also Fischbarg v Doucet*, 9 NY3d 375, 380 [2007]). "CPLR 302 (a) (1) is a single act statute . . . [and, therefore] one New York transaction is sufficient . . . [so long as] the defendant's New York activities were purposeful and substantially related to the claim" (*C. Mahendra (NY), LLC v National Gold & Diamond Ctr., Inc.*, 125 AD3d 454, 457 [1st Dept 2015] [internal quotation marks omitted]; *see also SCPA of Upstate N.Y., Inc. v American Working Collie Assn.*, 18 NY3d 400, 403-404 [2012]).

Under CPLR 302 (a) (iii), the commission of a tortious act outside the state that has an effect inside the state, the site "of commercial injury is where the original critical events associated with the action or dispute took place, not where any financial loss or damages occurred" (*McBride v KPMG Intl.*, 135 AD3d 576, 577 [1st Dept 2016] internal quotation marks and citation omitted; *see also Cotia (USA) Ltd. v Lynn Steel Corp.*, 134 AD3d 483, 484 [1st Dept 2015]).

To establish an alter ego claim, a party must "establish the complete domination of one entity by the other with respect to the transaction being challenged to justify piercing the corporate veil, and that such domination was used to perpetrate a wrong against the plaintiff causing the plaintiff's injury" (*Shaltiel v Wildenstein*, 288 AD2d 136, 137 [1st Dept 2001], *citing Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141-142 [1993]).

"Upon a CPLR 3211 (a) (8) motion to dismiss for lack of personal jurisdiction, it is the plaintiff who bears the ultimate burden of proof to establish a basis for such jurisdiction. However, to successfully oppose such a motion, the plaintiff need only make a prima facie

showing that the defendant was subject to the personal jurisdiction of the court" (*Nick v Schneider*, 150 AD3d 1250, 1251 [2d Dept 2017] internal quotations omitted; *see also Mischel v Safe Haven Enters., LLC*, 161 AD3d 696, 697 [1st Dept 2018] holding where plaintiff made a sufficient start to establishing jurisdiction, a hearing was warranted).

DISCUSSION

Initially, the Individual Defendants assert that the May 2013 Order has determined that the court lacks jurisdiction over the dispute. However, this mischaracterizes the May 2013 Order (at 3), which addressed Woods' claim that IHTT's allegation were "insufficient to confer personal jurisdiction over [Woods] [since] the employment agreement was executed in Denver, Colorado and [Woods] worked from his North Carolina home while [IHTT] operated out of Denver, Colorado." The court denies the portion of the Individual Defendants' motion that seeks dismissal based upon the May 2013 Order.

As noted above, CPLR 301, New York's general jurisdictional statute, is usually limited to defendants that are domiciled in New York (*see IMAX*, 154 AD3d at 466-467; *Magdalena*, 123 AD3d at 601). Both the Individual Defendants have stated that they are residents of other States and plaintiff has not presented any evidence contradicting this.

Rather, plaintiff contends that the Individual Defendants are the alter egos of IHTT, which is asserted to have its principal place of business in New York (Amended Complaint, ¶ 4). Plaintiff has stated that both Individual Defendant are officers and the majority shareholders of IHTT. However, to establish alter ego status sufficient to pierce corporate separateness, a plaintiff must "establish the complete domination of one entity by the other with respect to the transaction being challenged to justify piercing the corporate veil, and that such domination was used to perpetrate a wrong against the plaintiff causing the plaintiff's injury" (*Shaltiel*, 288 AD2d at 137).

Plaintiff's showing of corporate ownership and officer status do not show such complete domination and that such domination was used to perpetrate plaintiff's claimed injury in this dispute. Consequently, plaintiff cannot establish personal jurisdiction over the Individual Defendants based upon CPLR 301.


The court now considers the plaintiff's claim that there is long arm jurisdiction pursuant to CPLR 302 (a). In this connection, plaintiff has contended that the Individual Defendants transacted business in New York and their business was related to his claim. He has presented the Brockman EBT in which Brockman has stated that IHTT had an office in New York, that he and Hoover were based in New York and that they conducted business in New York "[c]onstantly." In the Reply, the Individual Defendants have not addressed plaintiff's showing, and consequently, it must be accepted, since "[f]acts appearing in . . . [a party's] papers which the opposing party does not controvert, may be deemed to be admitted" (*Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]; *SportsChannel Assoc. v Sterling Mets, L.P.*, 25 AD3d 314, 315 [1st Dept 2006]).

Considering "the quality of the non-domiciliary's New York contacts" (*D & R Global Selections*, 29 NY3d at 298), the Individual Defendants' activities in conducting business were sufficiently purposeful and related to plaintiff's claim that the court can exercise long arm jurisdiction over them (*see SCPA of Upstate N.Y.*, 18 NY3 at 403-404; *C. Mahendra (NY)*, 125 AD3d at 457). This purposeful conduct also satisfies the minimum contacts for due process (*see D & R Global Selections*, 29 NY3d at 299-300). Therefore, the Individual Defendants' motion to dismiss plaintiff's complaint against them based upon lack of personal jurisdiction over them must be denied.

Accordingly, it is

ORDERED that the motion of Todd Brockman and Waco Hoover, pursuant to CPLR 3211 (a) (8), to dismiss plaintiff's complaint against them is denied.

7/2/2019
DATE


GERALD LEBOVITS, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT REFERENCE