My Size, Inc. v North Empire LLC
2020 NY Slip Op 30276(U)
January 6, 2020
Supreme Court, New York County
Docket Number: 653901/2018
Judge: Jennifer G. Schecter

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JENNIFER G. SCHECTER **PART** IAS MOTION 54EFM

Justice

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MY SIZE, INC.,

Plaintiff,

- v -

NORTH EMPIRE LLC,

Defendant.

----------X

INDEX NO. 653901/2018

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

NORTH EMPIRE LLC

Third-Party Plaintiff,

-against-

ELI WALLES, RONEN LUZON

Third-Party Defendants.

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Third-Party
Index No. 595772/2018

The following e-filed documents, listed by NYSCEF document number (Motion 001) 39-50 were read on this motion to/for DISMISS.

Third-party defendants Eli Walles and Ronen Luzon (defendants) move, pursuant to CPLR 3211(a)(7) and (a)(8), to dismiss the third-party complaint filed against them by third-party plaintiff North Empire LLC (North Empire) and for sanctions against North Empire and its counsel pursuant to 22 NYCRR § 130-1.1(a). North Empire opposes. The motion is granted to the extent that the action is dismissed for failure to state a claim. Sanctions are denied.

Background [1]

Unless otherwise noted, the facts below are taken from the third-party complaint (Dkt. 19).

This case arises from two securities purchase agreements between My Size, Inc. (My Size)—a Delaware corporation based in Israel that employs the defendants—and North Empire, New York LLC that owns and manages real estate investments. Under the first agreement, dated March 10, 2015 (March Agreement), North Empire agreed to pay My Size $1 million in cash for convertible debt evidenced by a Note dated March 10, 2015 (March Note). Under the second agreement, dated December 22, 2015 (December Agreement, with March Agreement, Agreements), North Empire agreed to pay My Size $1,450,000—in the form of a letter of credit for My Size's benefit—for convertible debt evidenced by a Note dated December 22, 2015 (December Note, with March Note, Notes). North Empire alleges that, under the terms of the Notes, upon the listing of My Size common stock on a U.S. securities exchange, the debt automatically converted to equity, obligating My Size to deliver the stock certificates within five days of conversion.

On July 14, 2016 (Listing Date), My Size common stock was listed on NASDAQ, automatically converting the Notes into 699,999 shares of My Size stock (Shares) at $3.50 per share. My Size's transfer agent based in New York, V Stock Transfer (V Stock), issued Stock Certificate No. 305 (Certificate) reflecting North Empire's shares. At defendants' direction, V Stock sent the Certificate to My Size in Israel by FedEx shipment that arrived

[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF). Page numbers refer to the e-filed PDF.

on August 15, 2016. On February 24, 2017, defendants directed their secretary to return the Certificate to V Stock. Finally, around April 26, 2017, North Empire received the Shares in electronic form. North Empire alleges that it was harmed by the delay in the delivery of the Shares, whose value dropped precipitously between July 2016 and April 2017. North Empire further alleges that defendants intended to artificially inflate My Size's share price by refusing to promptly deliver the Certificate, but it does not assert causes of action for intentional tortious conduct.

On August 7, 2018, My Size filed its complaint (Dkt. 2) against North Empire, alleging a breach of the December Agreement for failure to pay $616,000 of the $1,450,000 due thereunder. On September 27, 2018, North Empire filed its answer (Dkt. 5) and counterclaimed for breach of the Agreements and Notes for delaying the delivery of the Certificate. On the same date, North Empire filed its third-party complaint against defendants (Dkt. 19), asserting causes of action for gross negligence and negligence. Defendants now move to dismiss the third-party complaint for lack of personal jurisdiction and for failure to state a claim.

According to their affidavits (Dkt. 41 and 42), defendants are citizens and residents of Israel. Luzon is CEO and a director of My Size. Walles is chairman of the board. My Size's principal operations are conducted through its wholly-owned Israeli corporate subsidiary, My Size Israel 2014 Ltd. Defendants "occasionally travel" to, but have never been employed in, the United States, and they "sometimes" visit New York. Both attest that they have never traveled to New York in connection with any agreements between My Size and North Empire. Defendants do not contest the portions of the third-party complaint

alleging that they directed V Stock to send the Certificate to My Size in Israel and then back to V Stock in New York.

In its opposition to the motion, North Empire submits an affidavit by its president, Mark Martin (Dkt. 48). Martin attests that defendants emailed the unexecuted Agreements to him in New York; that from 2015 to 2017, Martin spoke with defendants by phone, text and email, on average, once per week, while physically present in New York for a "large majority" of the communications; and that Martin communicated with defendants regarding delivery of the Certificate "dozens of times" after the Listing Date. Defendants did not submit affidavits with their reply brief.

Discussion

Personal Jurisdiction

A plaintiff has the burden to show that personal jurisdiction may be exercised over a defendant under New York's long arm statute (CPLR 302) (*see O'Brien v Hackensack Univ. Med. Ctr.*, 305 AD2d 199, 200 [1st Dept 2003]) and the Due Process Clause of the Federal Constitution (*see LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 218 [2000]). Under CPLR 302(a)(1), a New York court may exercise jurisdiction over a non-domiciliary as to a cause of action where the non-domiciliary, in person or through an agent, transacts business within New York or contracts to supply goods or services in the state. The Due Process Clause requires a nondomiciliary to "have 'certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice'" (*Al Rushaid v Pictet & Cie*, 28 NY3d 316, 331 [2016], quoting *Intl. Shoe Co. v Washington*, 326 US 310, 316 [1945]).

Under CPLR 302(a)(1), "proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, 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]). "A non-domiciliary defendant transacts business in New York when 'on his or her own initiative[,] the non-domiciliary projects himself or herself into this state to engage in a sustained and substantial transaction of business'" (*D & R Global Selections, S.L. v Bodega Olegario Falcon Pineiro*, 29 NY3d 292, 298 [2017], quoting *Paterno v Laser Spine Inst.*, 24 NY3d 370, 377 [2014]). For example, "[j]urisdiction may be predicated on a transaction conducted by means of telephone calls, faxes, and the acts of an in-state agent" (*Courtroom Tel. Network v Focus Media, Inc.*, 264 AD2d 351, 353 [1st Dept 1999]). Ultimately, "[t]he key inquiry is whether defendant purposefully availed itself of the benefits of New York's laws" (*id.*).

While conceding that this court lacks general jurisdiction over defendants, North Empire asserts that this court may exercise personal jurisdiction over them pursuant to CPLR 302, citing three presently uncontested allegations to support its position. First, defendants are alleged to have directed My Size's transfer agent, V Stock, located in New York, to send the Certificate to My Size in Israel. Second, defendants are also alleged to have directed the Certificate to be mailed back to V Stock in New York. Third, defendants communicated with Martin, North Empire's president, via phone, text and email dozens of times, many of them while Martin was in New York, in connection with the stock transfer at issue in this litigation.

Personal jurisdiction exists here under CPLR 302(a)(1). As defendants concede, engagement by an individual in a business transaction solely in his or her corporate capacity does not insulate him or her from the court's exercise of personal jurisdiction over them under CPLR 302(a)(1). They argue, however, that defendants' communications into New York did not confer jurisdiction, citing cases where phone calls and written correspondence were deemed insufficient absent New York-based conduct attributable to the defendant (*see Barington Capital Group, L.P. v Arsenault*, 281 AD2d 166 [1st Dept 2001] [five phone calls in three days to buy stock]; *J.E.T. Advertising Assocs., Inc. v. Lawn King, Inc.*, 84 AD2d 744, 745 [2d Dept 1981] [contract negotiated by telephone and mail]; *Beacon Enters., Inc. v Menzies*, 715 F2d 757, 766 [2d Cir 1983] [cease and desist letter]; *Beatie And Osborn LLP v Patriot Scientific Corp.*, 431 F Supp 2d 367 [SDNY 2006] [phone calls by plaintiff attorney to negotiate retainer, collect information and seek guidance in performing contract]; *Current Textiles Corp. v Ava Indus.*, 624 F Supp 819, 821 [SDNY 1985] [phone calls made by plaintiff]).

Defendants ignore the New York-based conduct of V Stock (My Size's transfer agent) and their own role in redirecting the Certificate from New York to Israel and then back to New York. In fact, North Empire "need not establish a formal agency relationship" between V Stock on the one side and defendants on the other (*Kreutter*, 71 NY2d at 467). It is sufficient for purposes of establishing personal jurisdiction in New York that V Stock engaged in "purposeful activities in this State in relation to [the] transaction for the benefit of and with the knowledge and consent of" defendants and that they "exercised some

control" over V Stock "in the matter" (*id.*). Accordingly, personal jurisdiction over defendants is satisfied pursuant to CPLR 302(a)(1).[2]

Motion to Dismiss – CPLR 3211(a)(7)

On a motion to dismiss, the facts alleged in the complaint are accepted as true as are all reasonable inferences in the proponent's favor that may be gleaned from them (*see Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 [1st Dept 2009]; *Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration" (*Skillgames*, 1 AD3d at 250). The court determines whether the pleading states the elements of a legally cognizable cause of action; if the pleading does so, the motion to dismiss must be denied (*see id.*). Deficiencies, moreover, may be remedied by proper affidavits (*see Amaro*, 60 AD3d at 491; *see also Leon v Martinez*, 84 NY2d 83, 88 [1994] ["a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint"]).

[2] Exercising jurisdiction does not violate the Due Process Clause. Defendants solicited New York investors, had My Size listed on the NASDAQ stock exchange, directed V Stock's conduct in the state, communicated with Martin in New York and mailed the Certificate back to New York. Performance of these actions in defendants' capacity as My Size employees does not insulate them from a finding of jurisdiction (*see Kreutter*, 71 NY2d at 470-471, citing *Calder v Jones,* 465 US 783 [1984]). Nor have defendants shown that the exercise of such jurisdiction would offend "traditional notions of 'fair play and substantial justice'" (*LaMarca*, 95 NY2d at 217, quoting *Burger King Corp. v Rudzewicz*, 471 US 462, 476 [1985]).

The third-party complaint asserts causes of action for negligence and gross negligence. It alleges that defendants owed My Size shareholders such as North Empire a duty and that, by delaying delivery of the Certificate to North Empire, Walles and Luzon breached that duty in a manner that "evidenced a reckless disregard for the rights of North Empire that smacked of intentional wrong doing" (Dkt. 19 ¶ 28).

Negligence requires breach of a duty and injury that proximately results from that breach (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016], *rearg denied* 28 NY3d 956 [2016]). Gross negligence is "conduct that evinces a reckless indifference to the rights of others" and "smack[s] of intentional wrongdoing" (*Sommer v Fed. Signal Corp.*, 79 NY2d 540, 554 [1992]). Moreover, "a corporate officer who participates in the commission of a tort may be held individually liable, regardless of whether the officer acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil is pierced" (*American Express Travel Related Servs. Co., Inc. v North Atl. Resources, Inc.*, 261 AD2d 310, 311 [1st Dept 1999]).

North Empire seeks to recover the benefit of its bargain with My Size—timely delivery of the Certificate—by suing defendants, as individuals, for North Empire's economic losses under the Agreements. North Empire cannot sue My Size in tort unless My Size violated a legal duty ***independent*** of the Agreements (*see 17 Vista Fee Assocs. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 83 [1st Dept 1999]; *Sommer v Fed. Signal Corp.*, 79 NY2d 540, 551-552 [1992]; *see also Abacus Fed. Sav. Bank v ADT Sec. Services, Inc.*, 18 NY3d 675, 684-685 [2012]; *Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 389 [1987]; *Von Sengbusch v Les Bateaux De N. Y., Inc.*, 128 AD3d 409,

410 [1st Dept 2015]). Nor, as North Empire acknowledges, can it sue My Size officers for breaching a duty arising solely from the Agreements, because corporate officers cannot be held personally liable for a ***corporate*** breach of contract (*see Ishin v QRT Mgt., LLC*, 133 AD3d 449, 450 [1st Dept 2015], *lv denied* 27 NY3d 907 [2016]; *Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 109-110 [1st Dept 2002]; *see also Kopec v Hempstead Gardens, Inc.*, 264 AD2d 714, 715 [2d Dept 1999] [dismissing cause of action for corporate officer's negligent workmanship on subject of contract of sale by corporation]; *Gordon v Teramo & Co., Inc.*, 308 AD2d 432, 433 [2d Dept 2003]; *Westminster Const. Co., Inc. v Sherman*, 160 AD2d 867, 868 [2d Dept 1990]; *B & M Linen, Corp. v Kannegiesser, USA, Corp.*, 679 F Supp 2d 474, 487 [SDNY 2010]).

North Empire asserts that defendants, as My Size corporate officers, owed an independent legal duty arising out of their relationship with North Empire as a ***shareholder*** of My Size. Defendants' reply does not address their relationship with My Size shareholders, which does give rise to certain ***fiduciary*** duties (*see Alpert v 28 Williams St. Corp.*, 63 NY2d 557, 568-569 [1984]; *Polk v Good*, 507 A2d 531, 536 [Del 1986]).[3] However, to the extent defendants were obligated to timely deliver the Certificate, this duty arose out of My Size's contracts with North Empire, and ***not*** that fiduciary relationship. My Size and North Empire, moreover, stood on opposite sides of the stock transactions reflected in the Agreements, which, absent special circumstances, could not give rise to a

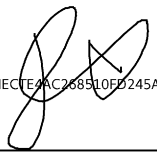
[3] Under the internal affairs doctrine, the law of the state in which the entity was incorporated controls the duties owed by its officers and directors (*see Venturetek, L.P. v Rand Pub. Co., Inc.*, 39 AD3d 317 [1st Dept 2007]).

fiduciary relationship with My Size or its principals (*see HF Mgt. Servs. LLC v Pistone*, 34 AD3d 82, 84 [1st Dept 2006]).[4]

Because the third-party complaint fails to identify an independent legal duty that supports its causes of action for negligence and gross negligence, it is dismissed. Accordingly, it is

ORDERED that the motion of third-party defendants Eli Walles and Ronen Luzon to dismiss the third-party complaint is granted; and it is further

ORDERED that the request by Eli Walles and Ronen Luzon for sanctions against third-party plaintiff North Empire LLC and its counsel is denied.



1/6/2020
DATE

JENNIFER G. SCHECTER, J.S.C.

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

[4] Moreover, defendants, as My Size corporate officers, owed fiduciary duties to ***My Size*** in directing its performance under the Agreements.