

**PMX Agency LLC v Blackstreet Capital Holdings,  
LLC**

2020 NY Slip Op 31558(U)

May 4, 2020

Supreme Court, New York County

Docket Number: 656185/2017

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 3

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PMX AGENCY LLC,

Plaintiff,

- v -

BLACKSTREET CAPITAL HOLDINGS, LLC, PREMIER  
CARE, LLC, PREMIER CARE HOLDINGS, INC.,  
PREMIER BATHS, INC., JONATHAN TIPTON,  
LAWRENCE S. BERGER,

Defendants.

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INDEX NO. 656185/2017

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 007

**DECISION + ORDER ON  
MOTION**

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 206, 208, 209, 210, 211, 212, 213, 214

were read on this motion to/for RENEWAL.

This action arises from the acquisition of defendant Premier Baths, Inc. (PBI) through a UCC debt foreclosure sale. Plaintiff PMX Agency LLC (PMX) provided PBI marketing-related services pursuant to a Master Services Agreement (MSA) entered into by nonparty Paradysz Inc. (Paradysz)—which was acquired by PMX on July 22, 2016—and PBI on September 27, 2013. The MSA was amended on February 5, 2015 to provide for a year of further services with an automatic option for a subsequent year on February 6, 2016, “unless either party gives written notice to the other of its intention not to renew at least thirty (30) days prior to the expiration of the then current term” (*see* NYSCEF 147 [MSA]).

Paradysz, and subsequently PMX, allegedly performed services under the MSA until April 6, 2016. In March 2016, PBI ceased making its scheduled payments to PBI but assured Paradysz that it would be paid various times in person and in writing; PBI allegedly asked

Paradysz to continue performing services under the MSA into April 2016 with the promise of later reimbursement (NYSCEF Doc. 144, ¶¶ 23-31 [summons and complaint] [alleging, specifically, that PBI executives Justin Cooper and Lawrence Bregel made those representations and accepted Paradysz's services]). On April 5, 2016, Cooper and Bregel "suddenly stopped communicating" with Paradysz, prompting its CEO, Chris Paradysz, to write to those executives: "[n]ow, with the lack of payment and any communication about payment status, we're in a very bad position with \$2m owed. Without communication we can't fend off vendors and keep our own agency and other clients from being cut off. That's unacceptable" (*id.* at ¶ 34 [alteration in original] [emphasis omitted]).

Instead of receiving a response from PBI, defendant Blackstreet Capital Holdings, LLC (BCH), through its Vice President, defendant Jonathan Tipton, responded to the email the same day, April 5, 2016. Tipton stated: "we are quickly getting up to speed on your recent conversations with Justin, Larry and David. We understand your importance to Premier Care and we would like to set up a call for Thursday morning if that works for your schedule" (*id.* ¶¶ 35-36). Paradysz told Tipton that BCH, which had acquired a package of businesses, including PBI, that the marketing services would continue if "we re-establish the steady payments" for overdue sums and as-yet uncompensated services (*id.* ¶ 36). Tipton responded: "We also would like to have a more strategic discussion with you when you're available" but will call a Paradysz representative "[i]n the interim . . . to walk through the immediate concerns as we do not want the marketing channels turned off" (*id.* ¶ 37 [emphasis omitted]). BCH had acquired PBI and PBI's parent entity in a UCC debt foreclosure process in or around March – April 2016. Specifically, Paradysz/PMX learned that BCH "took over [PBI] and transferred all of its assets to" defendant Premier Care, LLC (PCL); according to Coopers April 20, 2016 letter, those

transferred assets were comprised of all assets, intellectual property, funds, and brands of PBI, as well as any inventory PBI held at the time (*id.* ¶¶ 42-44). PMX alleged that BCH, PCL, and defendant Premier Care Holdings, Inc. (PCHI) “are now using the Transferred Assets [from PBI] to continue to conduct [PBI’s prior] business” (*id.* ¶ 46). Defendants concede that the transfer of PBI’s assets to PCL was accomplished through PCHI, a special purpose holding entity organized under the laws of Delaware.

The next day, April 6, 2016, “Defendants shut off Paradysz’s access to the tool needed to carry out Paradysz’s digital marketing services pursuant to the MSA contrary to the representations that the Premier and [BCH] executives had been making to Paradysz” (*id.* ¶ 39).

### **Relevant Procedural History**

Defendants moved to dismiss the complaint (Motion 001) and this Court (Bransten, J.), as relevant, dismissed the complaint as against PCHI for lack of personal jurisdiction but denied the motion as to BCH, over which personal jurisdiction was found to be proper, and permitted the unjust enrichment claim to continue against BCH (*see* NYSCEF Doc. 107). Defendants’ motion to reargue was denied (*see* NYSCEF Doc. 135) and defendants did not timely appeal those decisions and orders.

PMX now moves, pursuant to CPLR 2221 (e), to renew Motion 001 to the extent that the Court found personal jurisdiction to be lacking as to PCHI on the basis of new evidence received during the course of discovery. PMX simultaneously moves, pursuant to CPLR 3025 (b), for leave to amend its complaint to add various additional factual allegations relating to BCH and PCHI and to assert breach of MSA claims against both under various theories, including de facto merger and continuation of business (*see* NYSCEF Doc. 142 *et seq.*).

### Analysis

PMX's two present motions are intertwined: first, PMX seeks to renew the previously decided motion to dismiss (Motion 001) and, upon renewal, reverse the Court's (Bransten, J.) prior determination that personal jurisdiction is improper against PCHI (*see* NYSCEF Docs. 146 [order]; 145 [tr of bench decision]); second, PMX seeks leave to amend the complaint to assert, among other things, claims for breach of the MSA against BCH and PCHI under theories of assumption of the contract, continuation of the business, and *de facto* merger, and further seeks to include PCHI as a defendant in its existing unjust enrichment claim (*see* NYSCEF Doc. 168 [redline copy comparing prior complaint with proposed amended complaint]). Accordingly, the two motions should be considered in tandem as the proposed new allegations and claims in large part hinge upon granting the renewal motion and, upon renewal, finding that personal jurisdiction is proper as to PCHI.

#### **PMX's Motion to Renew**

A motion to renew under CPLR 2221 (e) must, among other things, "be based upon new facts not offered on the prior motion that would change the prior determination . . . and . . . shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [2]-[3]).

Justice Bransten previously found, as to PCHI, that personal jurisdiction was lacking and dismissed the complaint against it, stating as follows:

"Defendant Premier Care Holdings is a special purpose entity based in Delaware with no connection to New York. . . . On March 12, 2015, Premier Care Holdings filed a UCC Financing Statement, in Florida, against Premier Bath. . . . Premier Care Holdings is then alleged to have effectuated an asset transfer of all assets from Defendant Premier Bath Inc., a Florida based Corporation, to Defendant Premier Care LLC, a Florida based LLC through a Florida UCC lien foreclosure. Absent conduct which indicates a connection to New York, tortious conduct committed in New York, or a course of business dealings in New York, this court

has no personal jurisdiction over the Premier Care Holdings Defendant. And of course, the Court also makes note that the Master Service Agreement which does confer jurisdiction to New York courts, in this case Premier Care Holdings was not a signatory to that Master Service Agreement. So, therefore, you have to find personal jurisdiction outside of that agreement”

(NYSCEF 145 at 9-10 [Motion 001 tr]).

The Court, having examined the newly-discovered documents and testimony presented by PMX, finds that renewal is not warranted as there is nothing in the new submissions that requires a different result. The new submissions demonstrate, at most, that PCL and PCHI may have had a common executive (Kuby) who simultaneously served in roles at each entity and that BCH and PCHI may have had a common executive (Tipton) who simultaneously served in roles at each entity. The new submissions do not demonstrate that either Kuby or Tipton engaged in any business relating to PMX/Paradysz or the MSA on behalf of PCHI; indeed, the communications with Paradysz from Tipton were signed by him as Vice President of BCH/using a BCH email address. While the submissions indicate the PCHI was the “Agent” that commenced the default and debt foreclosure protocols against PBI and its parent entity, those facts do not establish that PCHI, which undisputedly and immediately transferred all of PBI’s assets to PCL upon the foreclosure sale, has sufficient contacts with New York to warrant long-arm jurisdiction, or either assumed of the MSA, continued PBI’s business, or constituted a *de facto* merger with PBI to warrant jurisdiction under the MSA’s forum provision.

PMX has submitted the below documents that it obtained during the course of discovery that it asserts were in the defendants’ sole possession when the motion to dismiss was filed:

1. the Notice that was sent to PBI’s parent company which declared a default under a revolving facilities agreement and accelerated the parent entity’s debts, dated March 28, 2016, was sent by PCHI “as Agent” and “Security Trustee” (NYSCEF Doc. 150 [including, in addition, various documents and emails indicating, among other things, that Tipton also served as an executive (Secretary) at PCHI, and that Tipton at least discussed, if not negotiated, payment

- plans with Paradysz as to the past debt it was owed by PBI and future services to be performed]);
2. the letter of intent by which BCH, “on behalf of [PCHI],” offered to purchase PBI’s parent entities debts (NYSCEF Doc. 152);
  3. an email chain indicating that Tipton hired a replacement marketing firm on April 5, 2016 (NYSCEF Doc. 151);
  4. an email chain from PBI’s Bregel to, among others, BCH’s Berger and Murry Gunty, indicating that in-person meetings with Paradysz were scheduled for the week of March 28, 2016, sent March 23, 2016, in which BCH instructed to keep the meeting scheduled (NYSCEF Doc. 153);
  5. emails on April 5 and 6, 2016 between Paradysz and BCH regarding continued marketing services and planning meetings regarding strategic business and marketing decisions (NYSCEF Doc. 156 [including Tipton’s 4/5/16 email stating, “we do not want the marketing channels turned off,” and Tipton’s acknowledgement that they were “quickly getting up to speed on (Paradysz’s) recent conversations with” PBI and BCH executives]);
  6. email chains demonstrating that BCH was aware of unpaid Paradysz balances owed and other details surrounding the MSA/Paradysz’s services for PBI, and indicating internal PBI/BCH discussions regarding how to handle payment or nonpayment to Paradysz and retaining a new marketing firm throughout March – April 2016 (NYSCEF Doc. 211 [indicating also that a new firm was engaged on April 6, 2016 and Paradysz’s access was to marketing platforms was suspended on/around April 6, 2016]); and
  7. deposition testimony of two PBI executives indicating, among other things, that BCH and PCHI, to some degree, took control of PBI’s business operations prior to the execution of the surrender agreement between PBI and PCHI, as Security Trustee, on March 28, 2016 (*see* NYSCEF Docs. 148 [Bregel tr]; 149 [Cooper tr]; 150 [including surrender agreement signed by Kuby as President of PCHI]).

These documents do not provide a basis to renew under CPLR 2221 (e). Long-arm jurisdiction is to be discerned viewing the “totality of the circumstances and viewing the transaction as a whole” (*Wilson v Dantas*, 128 AD3d 176, 184 [1st Dept 2015], *affd* 29 NY3d 1051 [2017]), and the circumstances here do not warrant revisiting Justice Bransten’s decision. Accordingly, the motion to renew is denied pursuant to CPLR 2221 (e).

#### **PMX’s Motion for Leave to Amend**

PMX’s proposed amended complaint in large part hinges on the success of the renewal motion. The Court, having denied the motion to renew, now denies without prejudice PMX’s motion for leave to amend because the motion assumes, in significant part, that personal

jurisdiction is proper as to PCHI. PMX may file a new motion for leave to amend the complaint to assert or amend claims against the parties over which there is jurisdiction. *Such motion must include a redline copy clearly demonstrating the proposed changes in the original instance.*

The Court has considered the parties' remaining arguments and finds them unavailing. This constitutes the decision of the Court.

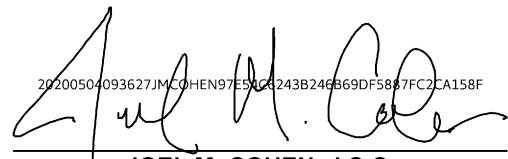
Accordingly, it is

**ORDERED** that Plaintiff's motion to renew is **DENIED**; and it is further

**ORDERED** that Plaintiff's motion seeking leave to amend the complaint is **DENIED** without prejudice to a new motion to be made, if at all, within 20 days of the Court's entry of this decision and order on NYSCEF; and it is further

**ORDERED** that the parties shall appear for a status conference on June 29, 2020 at 10:00 AM.

5/4/2020  
DATE

  
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JOEL M. COHEN, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input 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