

**Certa Dose, Inc. v COPIC Ins. Co.**

2020 NY Slip Op 34009(U)

October 20, 2020

Supreme Court, Queens County

Docket Number: 720576-2019

Judge: Leonard Livote

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### Short Form Order

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10/20/2020  
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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LEONARD LIVOTE

Commercial Division

Acting Justice

\_\_\_\_\_  
CERTA DOSE, INC., AND DANIEL HOFFMAN,  
Plaintiffs,

Index  
Number 720576 2019

- against -

Motion  
Date September 1, 2020

COPIC INSURANCE COMPANY, STEVE RUBIN,  
STEPHEN R. HOFFENBERG, JOHN BLOOD,  
COOLEY LLP, ALAN YOUNG SYNN,  
DAVIS K. HURLEY, BRIAN C. HARRINGTON,  
DANIEL LEE MILLER, NILES COLE,  
J. DANIEL MILLER, JEFFREY ALVIN DORSEY,  
GERALDINE A. LEWIS-JENKINS, MARK A. FOGG,  
MATTHEW FLEISHMAN, THEODORE J. CLARKE,  
MICHAEL L. PLATT, KELLY BARTLING,  
ADAM DINOW, THOMAS S. COWAN,  
ANTHONY R. MAYER, PHOEBE FISHER,  
LFD III GRAT-TRUST U/A 8-26-2015,  
KATHERINE DRISCOLL, Trustee, and LEE F. DRISCOLL,  
Defendants.

Motion Seq. No. 5

The following papers EF114 - EF253 numbered below read on this motion by defendants COPIC Insurance Company, Steve Rubin, Stephen R. Hoffenberg, and Mark A. Fogg (collectively the COPIC defendants) for an order pursuant to CPLR 3211 dismissing the complaint against them and on this cross motion by plaintiff Certa Dose, Inc. and plaintiff Daniel Hoffman for an order, inter alia, permitting them to engage in discovery concerning the basis for jurisdiction

Papers  
Numbered

Notice of Motion- Affidavits- Exhibits ..... 114-129

Notice of Cross Motion Affidavits - Exhibits .....	184-252
Answering Affidavits-Exhibits .....	
Reply Affidavits.....	
Memoranda Of Law.....	130, 194, 253

Upon the foregoing papers it is ordered that the motion by the COPIC defendants is granted. The plaintiffs' cross motion is denied.

I. The Plaintiffs' Allegations

The plaintiffs allege the following:

Plaintiff Certa Dose, Inc. is a Delaware corporation, and plaintiff Daniel Hoffman is a resident of New York. The plaintiffs allege that the principal business of Certa Dose is now licensing, which was done from its New York office and that almost all of the company's revenues have been generated from its New York office. Defendant John Blood helped Dr. Caleb Hernandez, the founder and majority shareholder of Certa Dose, in the 2013 incorporation of the company. Blood acted through his connections at defendant Cooley LLP, which acted for Certa Dose and thereafter became its chief counsel.

Defendant COPIC Insurance Company (COPIC), a Colorado corporation that allegedly does business in New York, provides professional medical liability insurance. Copic manages and reinsures Copic Risk Retention Group (COPIC-RRG) for multi-state coverage including New York . " COPIC -RRG insureds 'have direct relationships with [Copic's ] recognized physician risk managers, claims department, underwriting staff, and other team members; and [also] have the option to access [Copic's ] extensive patient safety and risk management resources.'"

Defendant Steve Rubin, a resident of the state of Colorado, served on the board of directors of COPIC and as the company's president. COPIC appointed him to be a director on Certa Dose's board of directors. Defendant Stephen R. Hoffenberg, a resident of Colorado, has worked for and/or is affiliated with COPIC. Defendant John Blood, a resident of Colorado served as an officer of Certa Dose. Defendant Mark A. Fogg, an attorney who resides in Colorado, is employed by or is affiliated with COPIC.

Beginning in 2014, COPIC made investments in Certa Dose pursuant to which those companies and other parties entered into a Series Seed Preferred Stock Purchase Agreement, an Investor Rights Agreement, a Co-Sale Agreement, and a Voting Agreement. In 2016, COPIC purchased additional preferred stock from Certa Dose

pursuant to a Series Seed 2 Stock Purchase Agreement.

In 2018, Hernandez became Certa Dose's CEO and Chairman, and John Blood became its COO and CFO with responsibilities for the core business, operations and sales. While in Colorado, Blood wasted corporate assets and kept secret records. Blood's malfeasance was brought to the attention of the COPIC-appointed board members, but the the board did not address the matter.

In the summer of 2019, Blood and investors affiliated with COPIC made a hostile takeover attempt of Certa Dose, causing Hernandez to demand an investigation. An appraiser was also hired to determine the value of Certa Dose, and the appraiser set the company's value between \$67,000,000 and \$120,000,000. Hoffenberg and Rubin intended to use the valuation for their benefit.

In October 2019, Hoffenberg and Rubin "attempted to hold a meeting at COPIC headquarters in Colorado \*\*\* with the apparent intent of forcing the sale on through without an investigation." Certa Dose suspended Hoffenberg, Rubin, and Blood, and the company demanded that Hoffenberg and Rubin disclose copies of the communications between themselves and potential Series A investors, but they declined to do so. Certa Dose removed Hoffenberg and Rubin from the board and chose new directors.

The new board became aware of provisions in Certa Dose's Certificate of Incorporation and prior transaction documents that had not been disclosed to it. The new board determined that provisions in the Certificate of Incorporation and the prior transaction documents to which Certa Dose had agreed were unfair and took steps to amend them. In November 2019, the new Board and the noteholders who the new board determined "had acted in good faith" revised the various note agreements without the consent of the other parties to previous versions of the agreements, such as COPIC and Rubin.

Certa Dose began this action by the filing of a summons with notice on December 9, 2019. On December 20, 2019, COPIC, Hoffenberg, and others (all of whom are also defendants in this action) sued Certa Dose in Colorado to recover principal and interest that Certa Dose allegedly owes them on two series of promissory notes. On June 22, 2020, the Colorado court denied Certa Dose's motion to dismiss and/or stay that litigation until this action is resolved.

## II. The Allegations of the COPIC Defendants

Steve Rubin, the President of COPIC swears: "COPIC is incorporated and has its principal place of business in Colorado. COPIC's primary business activity is the provision

of medical liability insurance and other financial products to health care professionals and facilities, primarily in Colorado. While COPIC does offer certain products outside of Colorado, the majority of COPIC's premium revenue is derived from Colorado sources. COPIC does not maintain a physical presence in the State of New York, is not licensed to engage in the business of insurance in New York, has not written any policies in New York, has not engaged, or attempted to engage, in the business of insurance in New York, and does not own real property in New York. COPIC Risk Retention Group ("RRG") is a separate legal entity from COPIC. COPIC does not have any ownership interest in RRG, nor does RRG have any ownership interest in COPIC. COPIC does not solicit business in New York in conjunction with RRG. It is a separate legal entity, the COPIC Trust, that has entered into a Service Agreement with RRG.

## II. Discussion

### A. The Motion by Defendants COPIC, Hoffenberg, Rubin, and Fogg

#### 1. Jurisdiction

In a proper case, a court may exercise general jurisdiction and/or specific jurisdiction over a non-domiciliary defendant. (*See, Lowy v. Chalkable, LLC*, 186 AD3d 590 [2<sup>nd</sup> Dept. 2020]; *Aybar v. Aybar*, 169 AD3d 137, [2<sup>nd</sup> Dept 2019].) "A court with general jurisdiction may hear any claim against that defendant, even if all the incidents underlying the claim occurred in a different State \*\*\*. Specific jurisdiction, on the other hand, depends on an affiliation between the forum and the underlying controversy, principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation \*\*\*." (*Aybar v. Aybar, supra*, 143 [internal quotation marks and citations omitted].)

In determining whether a court of New York has personal jurisdiction over a non-domiciliary, a two- step analysis must be employed. First, the court must inquire whether there is a statute which confers jurisdiction over the non-domiciliary, and, second, the court must inquire whether the exercise of jurisdiction meets due process standards. (*See, Darrow v. Deutschland*, 119 AD3d 1142 [3rd Dept 2014]; *Andrew Greenberg, Inc. v. Sirtech Canada, Ltd.*, 79 AD3d 1419 [3rd Dept 2010].)

CPLR 301, "Jurisdiction over persons, property or status," New York's general jurisdiction statute, provides : "A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore." (*See, Aybar v. Aybar, supra.*) Before the United States Supreme Court rendered its decision in *Daimler AG v. Bauman*, 571 US 117[2014]), the rule was that "[a] foreign corporation is amenable to suit in New York courts under CPLR 301 if it has engaged in such a continuous and systematic course

of 'doing business' here that a finding of its 'presence' in this jurisdiction is warranted \*\*\*." (*Landoil Res. Corp. v. Alexander & Alexander Servs., Inc.*, 77 NY2d 28, 33 [1990], quoting *Laufer v. Ostrow*, 55 NY2d 305, 309–310 [1982]; *Aybar v. Aybar*, *supra*.) In *Daimler* (*supra*), the United States Supreme Court made clear that the exercise of general jurisdiction must also not exceed the limits imposed by federal due process. After *Daimler* (*supra*), the rule is that "a court is authorized to exercise general jurisdiction over a foreign corporation when the corporation's affiliations with the state are so continuous and systematic as to render them essentially at home in the forum State." (*Aybar v. Aybar*, *supra*, 144 [internal quotation marks and citations omitted].) General jurisdiction may be acquired by a state only where the corporation "is incorporated or has its principal place of business," or where its "affiliations with the State are so 'continuous and systematic' as to render them essentially at home \*\*\*." (*Daimler AG v. Bauman*, *supra*; *Aybar v. Aybar*, *supra*.)

This court does not have general jurisdiction over COPIC. The company is incorporated in Colorado and has its principal place of business in Colorado. COPIC is not physically present in New York, and does not solicit or engage in business in New York. COPIC - RRG is a separate legal entity from COPIC.

As far as specific jurisdiction is concerned in this case, "[i]n deciding whether an action may be maintained in New York against a nondomiciliary defendant, the court must first determine whether jurisdiction exists under New York's long-arm statute (*see* CPLR 302) based upon the defendant's contacts with this state; and, if it does, the court then determines whether the exercise of jurisdiction comports with due process. (*Darrow v. Deutschland*, *supra*, 1143 [internal citation and quotation marks omitted].)

CPLR 302, "Personal jurisdiction by acts of non-domiciliaries," provides in relevant part: "(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent: 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, except as to a cause of action for defamation of character arising from the act; or 3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state."

The complaint alleges that plaintiff Daniel Hoffman "was sent the agreements and instruments concerned in New York, which he executed in New York and then mailed

back to Certa Dose, Inc.” The complaint further alleges: “all of the parties to the promissory note agreements exchanged covenants with a New York resident, i.e., Plaintiff Daniel Hoffman.”

The plaintiffs’ attorney adds: “All of the Defendants in this litigation entered conjoined promissory note agreements with parties in New York and even consented to amendment of those notes that affected all the parties equally. \*\*\*As such, they have submitted to specific jurisdiction, per CPLR 302(a)(1), particularly as: (1) the notes were purposefully entered into; (2) the note instruments were a significant instrumentality in the scheme concerned and complained-of wrongs; and (3) the causes of action concerned arise out of numerous acts that are ultimately tied to those notes.”

These allegations are insufficient to establish a jurisdictional basis under CPLR 302(a) (1) concerning the transaction of business in New York. The critical promissory note is an agreement between two Colorado domiciliaries ( COPIC and Hoffenberg), and Certa Dose, a Delaware corporation with its core business in Colorado. Plaintiff Hoffman, a New York resident, was not a party to the relevant note purchase agreements between any of the COPIC defendants and Certa Dose. The plaintiffs’ complaint does not sufficiently allege that COPIC “ avail[ed] itself of the privilege of conducting activities within the forum State.” (*Nick v. Schneider*, 150 AD3d 1250, 1252 [2<sup>nd</sup> Dept 2017].)

A plaintiff invoking long arm jurisdiction under CPLR 302(a)(1) must establish two elements: (1) the defendant transacted business within the state, and (2) the cause of action arose from that transaction of business. (*Nick v. Schneider*, 150 AD3d 1250 [ 2<sup>nd</sup> Dept 2017].) As for the first prong, “[w]hether a defendant has transacted business within New York is determined under the totality of the circumstances \*\*\*” (*Paradigm Mktg. Consortium, Inc. v. Yale New Haven Hosp., Inc.*, 124 AD3d 736, 737, [2<sup>nd</sup> Dept 2015]), and the sending of documents for plaintiff Hoffman to sign in New York was just one of the many circumstances of this case. Moreover, “the situs of commercial injury is where the original critical events associated with the action or dispute took place.” (*CRT Invs., Ltd. v. BDO Seidman, LLP*, 85 AD3d 470, 471–72 [1<sup>st</sup> Dept 2011].) The affidavit of Caleb S. Hernandez, the founder and CEO of plaintiff Certa Dose, giving the background of this action, concerns wrongful activity in Colorado, not New York. As for the second prong, the plaintiffs’ causes of action against the COPIC defendants did not arise from the transaction of business in New York. (*See, e.g., Magwitch, L.L.C. v. Pusser's Inc.*, 84 AD3d 529, 531 [2<sup>nd</sup> Dept 201] [“ The acts of sending payments to a New York bank account and correspondence to a New York address, and engaging in telephone discussions with plaintiff's principal, who also was defendants' legal advisor while he was in New York, were not a sufficient basis to satisfy the statutory requirements.”].)

“ CPLR 302(a)(1) jurisdiction is proper 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\*\*.” (*Fischbarg v. Doucet*, 9 NY3d 375, 380[2007] [internal quotation marks and citations omitted].) The sending of documents to New York for Hoffman to sign does not amount to purposeful activity in New York. Moreover, the allegation that Hoffman signed documents is merely incidental to many of the causes of action in the complaint. The complaint alleges nine causes of action: the first for breach of fiduciary duty, the second for aiding and abetting breach of fiduciary duties, the third for breach of the covenant of good faith and fair dealing, the fourth for breach of contract, the fifth for fraud, etc, the sixth for conversion, the seventh for equitable relief, etc., the eighth for legal malpractice, and the ninth for improperly buying securities. The critical events in this lawsuit underlying the causes of action asserted against defendant COPIC, Hoffenberg, and Rubin, such as for breach of fiduciary duty, occurred in Colorado, not New York. Defendant Fogg is an attorney in Colorado who provides legal services to COPIC, a Colorado corporation.

The plaintiffs’ attorney argues that “The COPIC Defendants cannot reasonably be shocked that they are being pulled into New York with regard to a hostile takeover attempt of a Company \*\*\*.” But the activities of defendants COPIC, Hoffenberg, and Rubin in New York, if any, have little or no relationship to the hostile takeover attempt. The affidavit of Caleb S. Hernandez, the founder and CEO of Certa Dose concerns wrongful activity in Colorado, not New York.

The plaintiffs did not show that this court can assert in personam jurisdiction under any branch of CPLR 302. Moreover, the defendants did not sign the documents consenting to jurisdiction in New York.

## 2. Forum non conveniens

CPLR 327, “Inconvenient forum,” provides in relevant part: “(a) When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action” ( *See, Pac. All. Asia Opportunity Fund L.P. v. Kwok Ho Wan*, 160 AD3d 452 [1st Dept 2018]; *Giovinazzo v. Giovinazzo*, 13 AD3d 625 [2nd Dept 2004]; *Mionis v. Bank Julius Baer & Co., Ltd.*, 9 AD3d 280 [1st Dept 2004].) The doctrine of forum non conveniens, codified in CPLR 327, allows a court to stay or dismiss an action, which even though jurisdictionally sound, would be better disposed of elsewhere. ( *See, Islamic Republic of Iran v. Pahlavi*, 62 NY2d 474 [1984].) In exercising its discretion, a court may weigh such factors as the burden imposed on New York courts, the potential applicability of foreign law, the potential hardship to the defendant, the location of potential witnesses and documents, the potential hardship to

proposed witnesses, the availability of an alternative forum in which the plaintiff may bring suit, the domiciles of the parties, and the place where the cause of action arose. ( *See, Islamic Republic of Iran v. Pahlavi, supra; Elmaliach v. Bank of China Ltd.*, 110 AD3d 192 [1st Dept 2013]; *Harleysville Ins. Co. v. Ermar Painting and Contracting, Inc.*, 8 AD3d 229 [2nd Dept 2004].)

The defendant has the burden of demonstrating that the chosen forum is an inconvenient one. ( *See, Islamic Republic of Iran v. Pahlavi, supra; Creditanstalt Inv. Bank AG v. Chadbourne & Parke LLP*, 14 AD3d 414 [1st Dept 2005]; *Harleysville Ins. Co. v. Ermar Painting and Contracting, Inc.*, *supra*; *vGrizzle v. Hertz Corp.*, 305 AD2d 311 [1st Dept 2003].) In the case at bar, the COPIC defendants successfully carried that burden. Defendants COPIC, Hoffenberg, Rubin, Fogg, and Blood are all located in Colorado, as are many other defendants among the over twenty defendants sued by the plaintiffs. Numerous causes of action arose in Colorado. Moreover, there is another action pending in District Court, Denver, Colorado to which COPIC, as plaintiff, and Certa Dose, as defendant, are parties which concerns the notes. Certa Dose did not file its complaint in this action until January 27, 2020, five weeks after the filing of the complaint in Colorado. The Colorado District Court has denied Certa Dose's motion to dismiss, and Certa Dose can assert its counterclaims in the Colorado action.

#### B. The Cross Motion by the Plaintiffs

The plaintiffs did not make a sufficient showing that they should have an opportunity to conduct discovery concerning the COPIC defendants possible contacts with New York which would confer jurisdiction in the courts of this state. ( *See, Peterson v. Spartan Indus., Inc.*, 33 NY2d 463 [1974]; *Qudsi v. Larios*, 173 AD.d 920 [2<sup>nd</sup> Dept 2019].)

Accordingly, the cross-motion is denied, the motion is granted, and it is,

ORDERED, that the complaint is dismissed as against defendants COPIC Insurance Company, Steve Rubin, Stephen R. Hoffenberg, and Mark A. Fogg.

This constitutes the Order of the Court.

Dated: October 20, 2020



A.J.S.C.

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