

**New York City Police Pension Fund v Plinneke**

2021 NY Slip Op 30333(U)

February 2, 2021

Supreme Court, New York County

Docket Number: 450055/2019

Judge: Louis L. Nock

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK PART IAS MOTION 38EFM

Justice

-----X

NEW YORK CITY POLICE PENSION FUND,

Plaintiff,

- v -

MARK PLINNEKE,

Defendant.

-----X

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

were read on this motion to/for

DISMISS

Upon the foregoing documents, the motion of defendant Mark Plinneke to dismiss the complaint is granted, in accord with the following memorandum decision.

Background

Plaintiff New York City Police Pension Fund brings this action to recover \$50,002.52 in overpayments of pension benefits (the "Overpayment") made to Frank W. Kiefer, defendant Mark Plinneke's deceased stepfather. The two-count complaint asserts causes of action for money had and received and unjust enrichment. Defendant, a California resident, moves to dismiss pursuant to CPLR 3211 (a) (8) for lack of personal jurisdiction or, in the alternative, pursuant CPLR 327 for forum non conveniens. Plaintiff cross-moves pursuant to CPLR 3025 (b) to amend the complaint to add a claim for conversion and allegations that purportedly support this court's personal jurisdiction over defendant. In addition, to the extent it may be necessary, plaintiff seeks jurisdictional discovery pursuant to CPLR 3211 (d).

As pled in the proposed amended complaint, Mr. Kiefer was an NYPD police officer and a member of plaintiff's pension plan (proposed amended complaint ¶¶ 5-6). When Mr. Kiefer retired from service, plaintiff began making retirement benefit payments to him (*id.* ¶ 8). Plaintiff states that it made the payments by electronic transfer from its JP Morgan Chase account in New York to an account with Wells Fargo Bank (the "Account") (Martin affirmation in opp ¶ 6). Notably, the Account appears to be located in California (*see* Martin affirmation in opp, exhibit B [statements for the Account contain the following notation: "California account terms and conditions apply"]). Mr. Keifer, his wife, Gwen Kiefer, and defendant were named as joint account holders on the Account (*id.* ¶ 9). Plaintiff alleges that it learned on February 28, 2017, that Mr. Kiefer died on September 4, 2015 (*id.* ¶ 7). According to plaintiff, Mr. Kiefer never filed a designation of beneficiary and, as such, it had no obligation to pay death benefits to anyone after his death (*id.* at 2, n. 1). Plaintiff alleges that it overpaid \$50,002.52 in benefits, and that Ms. Keifer and defendant continued to withdraw from the Account after Mr. Keifer's death (proposed amended complaint ¶ 14-18). By letter dated June 4, 2018, plaintiff informed Mrs. Kiefer of the Overpayment and demanded its return (*see id.*, exhibit G). By letter dated September 18, 2018, defendant responded, informing plaintiff of his mother's death on May 20, 2018, and requesting that plaintiff suspend any legal action to recover the Overpayment while they attempted to resolve the dispute (*see id.*).

Plaintiff commenced the instant action by filing its summons and complaint on January 16, 2019. On February 7, 2019, plaintiff completed service of the summons and complaint by personal service on defendant in California (*id.*, exhibit I). Defendant filed his answer on March 11, 2019, and moved to dismiss on May 13, 2019. In his affidavit in support of the motion to dismiss, defendant avers that Mr. Kiefer married defendant's mother in 1994 and that the couple

lived in Palm Desert, California (Plinneke aff ¶ 3). He states that in 2014, as a result of Mr. and Ms. Kiefer's failing health, he was "added as a co-signer to their bank account so that [he] could manage their finances from [his] home in Oregon" (*id.* ¶ 6). He states that in 2015, he moved in with his mother and stepfather to take care of them as they continued to decline. According to defendant, he and his mother "were both under the impression that the [plaintiff's payments] continued to arrive [after Mr. Kiefer's death] because [Ms. Kiefer] . . . was a co-beneficiary of the . . . pension" (*id.* ¶ 8). In addition, defendant avers that he kept his finances separate from that of his parents and only wrote checks on the account to assist his mother or, with her knowledge and consent, to reimburse himself for household expenses that he had paid from his own funds (*id.* ¶¶ 9, 11-13). He states that he knew nothing of the Overpayment until plaintiff called his mother in February 2017 and that he heard nothing more of the matter until the June 2018 letter (*id.* ¶ 15).

Defendant states that he is a resident of California, "where [he] intend[s] to permanently reside" (*id.* ¶ 16), and that he has never resided or transacted any business in New York and that he does not own any property in New York (*id.* ¶¶ 17-21). Lastly, he states that "[l]itigating this action in New York will cause significant expenses to [him] and present a serious inconvenience" (*id.* ¶ 22). Defendant contends that the court lacks personal jurisdiction over him, because he is not domiciled in New York and has no contacts with New York. In the alternative, defendant argues that, should the court find that personal jurisdiction exists, the action should be dismissed on *forum non conveniens* grounds. Plaintiff counters that the motion should be denied because defendant waived the jurisdictional defense. In addition, it argues that this court has long-arm jurisdiction pursuant to CPLR 302 (a) (1, (2) and (3), because defendant committed a tortious act that caused injury in New York and/or transacted business in New York

by withholding the Overpayment from a New York pension fund. In the alternative, plaintiff argues that it has made a sufficient start of demonstrating jurisdiction to warrant denial of the motion pending jurisdictional discovery pursuant to CPLR 3211 (d). Lastly, it argues that New York is the proper forum for this dispute.

### Discussion

Before a court may exercise personal jurisdiction over a non-domiciliary, it must find that both the long-arm statute (CPLR 302) and due process are satisfied (*see Williams v Beemiller, Inc.*, 33 NY3d 523, 528 [2019]). “If either the statutory or constitutional prerequisite is lacking, the action may not proceed” (*id.*). “[A]s the party seeking to assert jurisdiction, the burden belongs to plaintiff to present sufficient facts to demonstrate jurisdiction” (*Cotia [USA] Ltd. v Lynn Steel Corp.*, 134 AD3d 483, 484 [1st Dept 2015]). “[A] plaintiff need not present definitive proof of personal jurisdiction, but only make a ‘sufficient start’ in demonstrating such jurisdiction by reference to pleadings, affidavits, and other suitable documentation” (*Avilon Automotive Group v Leontiev*, 168 AD3d 78, 89 [1st Dept 2019] [internal citation omitted]). In deciding whether the plaintiff has met its burden, the court must accept all factual allegations as true and “draw[] inferences in the plaintiff’s favor” (*Wilson v Dantas*, 128 AD3d 176, 182 [1st Dept 2015], *affd* 29 NY3d 1051 [2017]).

CPLR 302 (a) (1) provides for personal jurisdiction over a non-domiciliary who “transacts any business within the state or contracts anywhere to supply goods or services in the state.” It is a “‘single act statute,’ whereby physical presence is not required and one New York transaction is sufficient for personal jurisdiction” (*D&R Global Selections, S.L. v Bodega Olegario Falcón Piñeiro*, 90 AD3d 403, 404 [1st Dept 2011] [internal citation omitted]). However, for jurisdiction to attach, “the defendant’s New York activities [must be] purposeful

and substantially related to the claim” (*id.*). “Purposeful activities are those with which a defendant, through volitional acts, avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws” (*id.* [internal quotation marks and citation omitted]; *see also Paterno v Laser Spine Inst.*, 24 NY3d 370, 377 [2014] [“where the non-domiciliary seeks out and initiates contact with New York, solicits business in New York, and establishes a continuing relationship, a non-domiciliary can be said to transact business within the meaning of CPLR 302 (a) (1)”]). CPLR 302 (a) (2) provides for personal jurisdiction over a non-domiciliary who “commits a tortious act within the state.” Finally:

A plaintiff relying on CPLR 302 (a) (3) (ii) must show that (1) the defendant committed a tortious act outside New York; (2) the cause of action arose from that act; (3) the tortious act caused an injury to a person or property in New York; (4) the defendant expected or should reasonably have expected the act to have consequences in New York; and (5) the defendant derived substantial revenue from interstate or international commerce.

(*Deutsche Bank AG v Vik*, 163 AD3d 414, 415 [1st Dept 2018].)

The Appellate Division, First Department, defines “the situs of commercial injury [as] where the original critical events associated with the action or dispute took place, not where any financial loss or damages occurred” (*id.* [internal quotation marks and citation omitted]; *see also Cotia [USA] Ltd.*, 134 AD3d at 484 [1st Dept 2015] [internal quotation marks and citation omitted] [“the situs of the injury is the location of the original event which caused the injury, not the location where the resultant damages are subsequently felt”]).

To satisfy due process, “a non-domiciliary [must have] ‘minimum contacts’ with the forum State . . . such that it ‘should reasonably anticipate being haled into court there’”

(*LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 216 [2000]).

Significantly, it is the defendant’s conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction. Thus, the United States Supreme Court has upheld the

assertion of jurisdiction over defendants who have purposefully reach[ed] out beyond their State and into another, while clarifying that the relationship between defendant and the forum state must arise out of defendant's own contacts with the forum and not contacts between the plaintiff (or third parties) and the forum State.

(*Williams*, 33 NY3d at 529 [internal quotation marks and citations omitted].)

Initially, defendant did not waive the defense of lack of personal jurisdiction because he timely filed his answer asserting the defense. Plaintiff's conclusion to the contrary is based on its incorrect reliance on CPLR 3012 (a), requiring that an answer be filed "within twenty days after service of the pleading." However, where, as here, service is made without the state, CPLR 3012 (c) provides for "service of an answer . . . within thirty days after service is complete." Plaintiff served defendant by personal delivery in California on February 7, 2019. Therefore, defendant had until March 9, 2019, to file his answer. Because March 9, 2019, fell on a Saturday, the time period was extended to "next succeeding business day" (General Construction Law § 25-a [1]), March 11, 2019, when defendant timely filed his answer, which asserts a defense of lack of personal jurisdiction (answer ¶ 23). Also contrary to plaintiff's contention, defendant did not waive the defense by failing to move to dismiss within 60 days of filing his answer. The sixty-day limit contained in CPLR 3211 (e), on which plaintiff relies, provides for waiver of an "objection that the summons and complaint . . . was not properly served." This is not the basis of the instant motion and, as such, the time limit is inapplicable.

Plaintiff also fails to demonstrate long-arm jurisdiction under CPRL 302 (a) (1), (2) or (3). First, its contention that the parties entered into "an agreement implied in equity that Defendant would not unjustly enrich himself by keeping and spending retirement benefits paid to Mr. Kiefer" and that this contract was "essentially executed and performed in New York" (Plaintiff's brief at 10) fails to satisfy CPLR 302 (a) (1). Even reading the allegations in a light

most favorable to plaintiff, plaintiff fails to allege that defendant engaged in any “volitional acts” (*D&R Global Selections, S.L.*, 90 AD3d at 404) or “[sought] out and initiate[d] contact with New York” such that he can be said to have “transact[ed] business within the meaning of CPLR 302 (a) (1)” (*Paterno*, 24 NY3d at 377; see *Ehrenfeld v Bin Mahfouz*, 9 NY3d 501, 511 [2007]) [“The mere receipt by a nonresident of a benefit or profit from a contract performed by others in New York is clearly not an act by the recipient in this State sufficient to confer jurisdiction under our long-arm statute”] [internal quotation marks and citation omitted]; *ABKCO Music, Inc. v McMahan*, 175 AD3d 1201, 1201 [1st Dept 2019] [finding that defendant’s request from Ohio to plaintiff in New York, “which . . . merely continue(d) plaintiff’s previous practice of sending royalties to . . . Ohio,” under a contract between plaintiff and a third party, “(did) not constitute transaction of business under CPLR 302 (a) (1)”]. Therefore, “jurisdiction cannot be conferred” under CPLR 302 (a) (1) (*Copp v Ramirez*, 62 AD3d 23, 28 [1st Dept], *lv denied* 12 NY3d 711 [2009]).

Second, plaintiff fails to allege that defendant “commit[ted] a tortious act within the state” under CPLR 302 (a) (2). It argues that defendant’s retention of the Overpayment constitutes conversion and that the tort occurred in New York, “because it was made possible by a New York wire transfer from POLPEN’s New York bank account” (Plaintiff’s brief at 8). However, conversion requires, not only “plaintiff’s possessory right or interest in the property,” but also “defendant’s dominion over the property or interference with it, in derogation of plaintiff’s rights” (*Dobroshi v Bank of America, N.A.*, 65 AD3d 882, 885 [1st Dept 2009], *appeal dismissed* 14 NY3d 785 [2010]). “Some affirmative act [by the defendant] . . . has always been an element of conversion” (*State of N.Y. v Seventh Regiment Fund*, 98 NY2d 249, 260 [2002]). Here, if such an act occurred, it necessarily occurred in California, where the Account and

defendant are located. As such, plaintiff fails to allege a tort committed in New York, as required for jurisdiction under CPLR 302 (a) (2).

Third, plaintiff fails to demonstrate jurisdiction under CPLR 302 (a) (3) (ii). It argues that the injury occurred in New York and that defendant should have expected such injury in New York, because plaintiff is a New York pension fund and the Overpayment came from its JP Morgan Chase bank account in New York. However, “the situs 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” (*Deutsche Bank AG*, 163 AD3d at 415 [internal quotation marks and citation omitted]). As explained above, here, the critical events, defendant’s alleged wrongful retention of the Overpayment, occurred in California. Therefore, California and not New York is the situs of the injury (*see Cotia [USA] Ltd.*, 134 AD3d at 484-85 [finding that, because the alleged fraudulent conveyance occurred in New Jersey, “this alleged tortious act did not cause injury within New York”]). In addition, plaintiff fails to demonstrate that defendant derived substantial income from interstate commerce. In support of this argument, plaintiff points to property defendant owns in Michigan and trust fund payments he receives from a Nevada bank (*see Martin* affirmation ¶ 16, exhibits F, L). It then speculates that defendant “apparently derives substantial revenue from interstate commerce between himself and the trust fund, as well as between himself and potential renters in Michigan” (Plaintiff’s brief at 9). Plaintiff’s conjectures about “potential renters” do not constitute evidence of defendant’s participation in interstate commerce, and its submissions do not demonstrate, *prima facie*, that defendant derived substantial revenue from interstate commerce (*compare Murdock v Arenson Intl. USA, Inc.*, 157 AD2d 110, 114 [1st Dept 1990] [stating that \$9,000 did not constitute “substantial revenue”], *with Allen v Canadian Gen. Elec. Co.*, 65 AD2d 39, 43 [3d Dept 1978]

[finding \$8.79 million was “prima facie ‘substantial’ and demonstrate(d) a sufficient contact with (New York) to support jurisdiction” under CPLR 302 (a) (3)], *affd* 50 NY2d 935 [1980]).

Therefore, plaintiff fails to demonstrate jurisdiction under CPLR 302 (a) (3).

What is more, plaintiff fails to demonstrate that defendant had the requisite minimum contacts with New York to satisfy due process. It relies solely on defendant’s alleged conversion of the Overpayment, arguing that the conversion took place in New York and that defendant injured a New York pension fund. However, as already explained above, to the extent a conversion took place, it occurred in California. As for plaintiff’s status as a New York pension fund, it is irrelevant to the analysis. “[T]he relationship between defendant and the forum state must arise out of defendant’s own contacts with the forum and not contacts between the plaintiff . . . and the forum State” (*Williams*, 33 NY3d at 529 [internal quotation marks and citations omitted]). “Given that [defendant] had no contact with New York and did not purposefully avail himself of New York, the constitutional guarantee of due process bars New York courts from exercising personal jurisdiction over him” (*Greenbacker Residential Solar LLC v OneRoof Energy, Inc.*, 174 AD3d 437, 438 [1st Dept 2019]).

Plaintiff’s request for jurisdictional discovery pursuant to CPLR 3211 (d) is denied. It argues that it should be permitted to conduct discovery into defendant’s potential income from interstate commerce, as such information is within defendant’s exclusive control. However, at best, such discovery would demonstrate the “substantial revenue from interstate . . . commerce” prong of CPLR 302 (a) (3) (ii), which, by itself, is insufficient to support the exercise of personal jurisdiction over defendant. Because plaintiff fails to make a “sufficient start” of demonstrating that personal jurisdiction may exist, to the extent it cross-moves for jurisdictional discovery, the motion is denied (*see Greenbacker Residential Solar LLC*, 174 AD3d at 438 [denying

jurisdictional discovery where plaintiff “failed to make a sufficient start on a showing of jurisdiction,” because it failed to allege injury in New York or that defendant received substantial revenue from interstate or international commerce]; *see also Mejia-Haffner v Killington, Ltd.*, 119 AD3d 912, 915 [2d Dept 2014] [finding that the plaintiffs “failed to indicate how further discovery might lead to evidence showing that personal jurisdiction exist(ed),” because they “ha(d) not alleged facts which would support personal jurisdiction under either CPLR 301 or under CPLR 302 (a) (1)”].

Having determined that the court lacks personal jurisdiction over defendant, “it is without power to issue a binding forum non conveniens ruling . . . .” (*Prime Props. USA 2011, LLC v Richardson*, 145 AD3d 525, 525 [1st Dept 2016]). Accordingly, the court does not consider the parties’ contentions on the issue.

To the extent plaintiff seeks leave to amend the complaint—to add a claim for conversion and allegations in support of personal jurisdiction, which it advanced in opposition to defendant’s motion to dismiss—the motion is denied. “Leave to amend pleadings under CPLR 3025 (b) should be freely given, and denied only if there is prejudice or surprise resulting directly from the delay, or if the proposed amendment is palpably improper or insufficient as a matter of law” (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012] [internal quotation marks and citations omitted]). As explained above, plaintiff’s allegations are insufficient to support the exercise of personal jurisdiction over defendant. Therefore, the proposed amended complaint (Martin affirmation, exhibit M), which merely reiterates the arguments offered on the instant motion, is palpably insufficient.

Accordingly, it is hereby

ORDERED that the motion by defendant to dismiss the complaint is granted and the Clerk is directed to enter judgment in favor of defendant dismissing this action, together with costs and disbursements to defendant, as taxed by the Clerk upon presentation of a bill of costs; and it is further

ORDERED that plaintiff's cross-motion for leave to amend the complaint and jurisdictional discovery is denied.

This shall constitute the decision and order of the court.

ENTER:

*Louis L. Nock*

February 2, 2021  
DATE

\_\_\_\_\_  
LOUIS L. NOCK, J.S.C.

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION  OTHER

APPLICATION:  GRANTED  SETTLE ORDER  SUBMIT ORDER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE