

Gibson, Dunn & Crutcher LLP v D'Anna

2021 NY Slip Op 34255(U)

September 15, 2021

Supreme Court, New York County

Docket Number: Index No. 160471/2016

Judge: David B. Cohen

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

<p>PRESENT: <u>HON. DAVID B. COHEN</u></p> <p style="text-align: center;"><i>Justice</i></p> <p>-----X</p> <p>GIBSON, DUNN & CRUTCHER LLP,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>JOSEPH D'ANNA, ELIO D'ANNA, ELIO D'ANNA, ELIA D'ANNA, GEORGE KOUKIS,</p> <p style="text-align: center;">Defendant.</p> <p>-----X</p>	<p>PART 58</p> <p>INDEX NO. <u>160471/2016</u></p> <p>MOTION SEQ. NO. <u>014 and 015</u></p> <p>INTERIM DECISION + ORDER ON MOTION</p>
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The following e-filed documents, listed by NYSCEF document number (Motion 014) 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 329, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

The following e-filed documents, listed by NYSCEF document number (Motion 015) 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 375

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

Motion sequence nos. 014 and 015 are consolidated for disposition.

In motion sequence no. 014, defendant George Koukis (Koukis) moves, by order to show cause, to vacate the appearance of Gil Santamarina, Esq. (Santamarina) of Santamarina & Associates in this action as unauthorized and deeming the actions taken by Santamarina void; to vacate his default under CPLR 5015 (a) (4) and dismiss the action against him for lack of personal jurisdiction or for improper service; or, to vacate his default under CPLR 5015 (a) (1). In motion sequence no. 015, Koukis moves, pursuant to CPLR 2303, to quash a subpoena duces tecum and a subpoena ad testificandum served by plaintiff Gibson, Dunn & Crutcher LLP or for an order granting him leave to object to specific requests in the subpoenas.

FACTUAL AND PROCEDURAL HISTORY

The relevant facts are set forth in this court's prior decisions with which familiarity is presumed. Thus, only the facts relevant to the present motions shall be recounted here. Briefly, defendants Elio D'Anna, Jr. (Elio Jr.), Joseph D'Anna (Joseph), Elio D'Anna Sr. (Elio Sr.), Elia D'Anna and Koukis (collectively, defendants), who are domiciled in Europe, are the founders or shareholders in nonparty Be In., Inc. (Be In), a New York corporation (NY St Cts Elec Filing [NYSCEF] Doc No. 302, Koukis affirmation, exhibit H, ¶¶ 4-8). Nonparty Alessandro Nomellini (Nomellini) served as Be In's chief financial officer and executive director and as defendants' agent (*id.*, ¶¶ 13-14). In 2013, Be In hired plaintiff to represent it in a lawsuit in California (*id.*, ¶ 12). When Be In failed to pay its legal fees, plaintiff obtained a monetary judgment against it in California (*id.*, ¶¶ 17 and 19). Plaintiff domesticated the judgment (*id.*, ¶ 20) in *Gibson, Dunn & Crutcher, LLP v Be In, Inc.*, Sup Ct, New York County, index No. 157022/2016.

Plaintiff then brought this action to set aside allegedly fraudulent conveyances of Be In's assets to defendants. Plaintiff effectuated service upon defendants by delivering the summons and complaint to Nomellini on January 17, 2017 at 725 Fifth Avenue, 19th Floor, Trump Tower, New York, New York 10022 and by mailing copies to defendants at that address the next day (NYSCEF Doc No. 295, Koukis affirmation, exhibit A, ¶¶ 3-4). Be In allegedly shares office space at that address with the "European School of Economics" (ESE) and the "Legacy Business School" (Legacy), businesses run by Elio Sr. or Nomellini (NYSCEF Doc No. 302, ¶ 16). Gino Barbera, Esq., an attorney at plaintiff, affirms that Nomellini stated he was authorized to accept service (NYSCEF Doc No. 295, ¶¶ 3 and 5). Santamarina purportedly represented all defendants in this action pursuant to a retainer agreement signed by Joseph "[i]ndividually and on behalf of [defendants]" (NYSCEF Doc No. 297, Koukis affirmation, exhibit C at 2). In connection with a

default motion, Santamarina signed a stipulation agreeing that “[d]efendants’ [sic] agree not to raise and hereby waive any defenses based on service of process or lack of personal jurisdiction” (NYSCEF Doc No. 301, Koukis affirmation, exhibit G at 1). Plaintiff obtained a default judgment, and the Clerk entered a monetary judgment against defendants (NYSCEF Doc No. 304, Koukis affirmation, exhibit J at 3). Koukis now moves to vacate his default and to dismiss the action against him for lack of jurisdiction, and also moves separately to quash two subpoenas served by plaintiff.

DISCUSSION

A. Koukis’s Motion to Vacate (Motion Sequence No. 014)

Koukis advances three arguments in support of his motion for dismissal based on lack of jurisdiction. First, he submits that Santamarina’s unauthorized appearance cannot confer jurisdiction. Koukis avers that he never asked Santamarina to represent him, never authorized Joseph “to represent to Mr. Santamarina that he was authorized to represent me in this action,” and only learned of Santamarina’s representation “[l]ong after Plaintiff commenced this action” (NYSCEF Doc No. 294, Koukis affirmation, ¶¶ 28, and 10). Koukis states that he has never spoken to or corresponded with Santamarina apart from a single email on December 16, 2019 (*id.*, ¶¶ 8 and 11), in which Koukis wrote, “I take this opportunity to inform you that I have not authorized you to represent me in any legal or other matters. Neither are you authorized to represent me in any future proceedings” (NYSCEF Doc No. 296, Koukis affirmation, exhibit B at 1). Koukis avers that he has not paid nor has Santamarina billed him for the work (NYSCEF Doc No. 294, ¶ 11). Santamarina has also admitted that he does not have Koukis’s contact information (*id.*, ¶¶ 10-12).

Koukis next contends that the court lacks jurisdiction based upon improper service under CPLR 308 (2) and CPLR 318. Koukis avers that he has never maintained a business at 725 Fifth Avenue, has never appointed Nomellini as his agent for any purpose, and has no affiliation with ESE or Legacy (*id.*, ¶¶ 5-6). He was not involved in Be In's operations or management and was never a shareholder, officer, manager, employee or director (*id.*, ¶ 18). Nonparty Zeus Corp. (Zeus), a Marshall Islands corporation Koukis owns, acquired a minority interest in Be In, as evidenced in a subscription agreement dated November 11, 2009 which shows that Zeus paid \$1 million for 15%, or 20.55 shares, of capital stock (*id.*; NYSCEF Doc No. 303, Koukis affirmation, exhibit I at 1-2). Zeus loaned \$500,000 to Be In in May 2010, and Koukis personally loaned more than \$400,000 to the company (NYSCEF Doc No. 294, ¶¶ 19-20). Nomellini denies ever serving as Koukis's agent and maintains that he lacked authority to act for him (NYSCEF Doc No. 306, Nomellini affirmation, ¶ 6). Nomellini affirms that Koukis was not involved in any of his businesses and that he has never seen Koukis at 725 Fifth Avenue (*id.*, ¶ 7).

Last, Koukis contends that the court lacks general and specific jurisdiction. Koukis has resided in Switzerland for more than 30 years (NYSCEF Doc No. 294, ¶ 3). He has never owned or leased real property in New York, engaged in any business here, or maintained an office, residence, mailing address, bank account, telephone line or telephone listing in this state (*id.*). He has visited the United States four times in the last eight years to visit his daughter, who resides in New York City (*id.*, ¶ 4). None of those visits were related to plaintiff or Be In (*id.*).

In the alternative, Koukis moves for vacatur under CPLR 5015 (a)(1), citing Santamarina's unauthorized appearance as a reasonable excuse. As for a meritorious defense, Koukis states:

"I never was an officer, manager, employee, or director of Be-In and never had anything to do with its operations or management of its business ... I never had anything to do with any transfers of funds in any form from Be-In to any individual or entity. I never had any

check writing authority and never wrote a check for Be-In. I never had any wire authority and never initiated or caused to be wired Be-In funds to anyone”

(*id.*, ¶ 18). Koukis asserts that Zeus has never received a return on its capital investment or loan

(*id.*, ¶ 19). In addition, Koukis avers that his personal loan to Be In has not been repaid (*id.*, ¶ 20).

Plaintiff argues that the exercise of long-arm jurisdiction is proper under CPLR 302 (a) (1) since Koukis transacted business here and its claims arise from his contacts with New York. It submits that jurisdiction is also proper under CPLR 302 (a) (2) since Be In’s New York bank accounts were used to acquire and disburse funds. Plaintiff contends that it properly served Koukis under CPLR 308 (2) and that Koukis’s claim that Be In’s office was not his actual place of business is insufficient to overcome the process server’s affidavit. It rejects the assertion that service was improper under CPLR 318 because service upon a designated agent is not required under CPLR 308 (2). Plaintiff also contends that Koukis has waived any objection to jurisdiction or improper service as a result of the stipulation signed by Santamarina. As for the relief sought under CPLR 5015 (a) (1), plaintiff submits that the application should be denied as untimely as well as because of Koukis’s failure to proffer a reasonable excuse and a meritorious defense.

1. Waiver of the Affirmative Defense of Lack of Jurisdiction

The court addresses the issue of whether Santamarina, as Koukis’s counsel, waived a defense based upon personal jurisdiction or improper service first since a valid waiver renders a discussion on jurisdiction or service moot. While a defendant may waive the defense of lack of personal jurisdiction by stipulation (*see Alfred E. Mann Living Trust v ETIRC Aviation S.A.R.L.*, 78 AD3d 137, 140 [1st Dept 2010]; *Morrison v Budget Rent a Car Sys.*, 230 AD2d 253, 260 [2d Dept 1997]), “an unauthorized appearance by an attorney is insufficient to confer jurisdiction” (*Greenpoint Sav. Bank v Mione*, 213 AD2d 375, 376 [2d Dept 1995], citing *Skyline Agency v*

Ambrose Coppotelli, 117 AD2d 135, 146 [2d Dept 1986]). As relevant here, “[t]he rule is well settled that by the appearance of an attorney for a nonresident the court acquires no jurisdiction if it should develop that such appearance was unauthorized” (*Amusement Sec. Corp. v Academy Pictures Distrib. Corp.*, 251 App Div 227, 229 [1st Dept 1937], *affd* 277 NY 557 [1938], *rearg denied* 277 NY 672 [1938]). Koukis, who resides in Switzerland, maintains that Santamarina’s appearance was not authorized.

Generally, a party seeking to be relieved of its counsel’s actions “must demonstrate that the attorney ‘was without authority of any sort to enter into the [stipulation]’” (*Pruss v Infiniti of Manhattan, Inc.*, 180 AD3d 163, 168 [1st Dept 2020], *lv dismissed* 35 NY3d 1001 [2020], quoting *Hallock v State of New York*, 64 NY2d 224, 230 [1984]). With regards to actual authority, “the scope of an agent’s actual authority is determined by the intention of the principal or, at least, by the manifestation of that intention to the agent” (*Wen Kroy Realty Co. v Public Natl. Bank & Trust Co.*, 260 NY 84, 89 [1932]). Plaintiff does not appear to contest that Santamarina lacked actual authority and contends that, even if actual authority is lacking, Santamarina had apparent authority.

Apparent authority turns on the “words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction” (*Hallock*, 64 NY2d at 231). The third party must provide “a factual showing that the third party relied upon the misrepresentations of the agent because of some misleading conduct on the part of the principal – not the agent” (*Ford v Unity Hosp.*, 32 NY2d 464, 473 [1973]). In this instance, plaintiff argues that Joseph’s and Koukis’s conduct gave Santamarina reason to believe that Koukis had consented to his representation. It directs the court to Joseph’s averments in an affidavit submitted in opposition to the default motion and to Joseph’s signature on the retainer agreement. Plaintiff further argues that defendants enjoyed close business and

personal relationships, with Nomellini testifying “D’Anna, Be In. They’re the same thing” (NYSCEF Doc No. 389, Mitchell A. Karlan [Karlan] affirmation, exhibit F at 43). Plaintiff also directs the court to a July 23, 2019 email Joseph sent to Elio Jr., on which Koukis was a recipient, in which Joseph explained, “[o]ur lawyers in defending Be In, had to automatically also defend all of the names that were listed in the pleadings (even the ones that were no longer in the company) – whether they asked for it or not – just because this is the way the Claim was pleaded. No representation was intended to be done in your name” (NYSCEF Doc No. 392, Karlan affirmation, exhibit I at 2). Plaintiff’s proof is deficient, however, since an “agent cannot by his own acts imbue himself with apparent authority” (*Hallock*, 64 NY2d at 231). Critically, plaintiff relies on Joseph’s actions (*see Ford*, 32 NY2d at 473; *Site Five Hous. Dev. Fund Corp. v Estate of Bullock*, 112 AD3d 479, 480 [1st Dept 2013]), but fails to present specific examples of Koukis’s actions or conduct directed at Santamarina.

The email correspondence between Koukis, Joseph and Elio Jr. is not dispositive on the issue of apparent authority. In one email to Koukis dated November 6, 2019, Joseph wrote, “you have been aware of this US proceedings [sic] for well over a year, and we’ve had plenty of discussions with both yourself and Julian on why these proceedings have been issued against Be In Inc. and its shareholders and what we are doing to defend them” (NYSCEF Doc No. 391, Karlan affirmation, exhibit H at 14). However, Joseph never stated whether Koukis was aware that Santamarina had been retained on his behalf or that Santamarina had waived the defense of lack of jurisdiction. Notably, it is unclear whether Joseph ever advised Koukis that Santamarina had moved to be relieved as counsel before the default judgment was entered.

Plaintiff cites *Rubino v City of New York* (145 AD2d 285, 288 [1st Dept 1989]) for the proposition that Koukis waived any jurisdictional objection because he participated in this action,

but *Rubino* is factually distinguishable. In *Rubino*, the summons and complaint were served upon defendant City of New York but not upon defendant Board of Education (the Board) (*id.* at 287). The Corporation Counsel appeared for “defendants” in the action which concluded in a trial and an appeal (*id.*). The Court denied the Board’s motion to dismiss for lack of jurisdiction based upon the Corporation Counsel’s repeated representations that it was acting for both defendants (*id.* at 288). The Board did not challenge this representation as unauthorized whereas here, Koukis stresses that he never hired Santamarina. In addition, as stated above, Santamarina’s motion to be relieved as counsel was denied. Despite service of subsequent motion papers upon him, Santamarina did not respond to them or purport to represent defendants. In fact, by letter to the court dated August 24, 2020, Santamarina advised, “I have not represented, nor have I had any contact with any of the Defendants to this action in over a year. I no longer serve as their counsel in this. Plaintiff is aware of the foregoing” (NYSCEF Doc No. 182).

The other cases cited by plaintiff (oral argument 8/3/21 tr at 36; NYSCEF Doc No. 395) are unavailing. In *Abbett v Blohm* (54 App Div 422 [1st Dept 1900]), the court entered a judgment against two defendants after an inquest (*id.* at 423). One defendant moved to vacate the judgment nine years later, arguing that the appearance on her behalf by counsel hired by a co-defendant was made without her authority, knowledge or consent and that she was never personally served with process (*id.* at 423). The Court observed:

“[w]here it is shown that the appearance of the attorney is unauthorized, the court undoubtedly has power in its discretion to vacate the appearance and set aside the judgment, but it is only proper to exercise that authority where the application has been made promptly or the other party has lost no rights by the delay”

(*id.* at 426). In denying the motion, the Court reasoned that the defendant's delay in moving for relief affected the plaintiff's ability to recover on its claim (*id.* at 424 and 426). *Abbett* also involves a New York resident's attempt to vacate a domestic judgment. The Court stated:

“an appearance by [an] attorney ... may be recognized by the adverse party as authentic and valid; that when an attorney takes upon himself to appear, the court, in case of a domestic judgment, looks no further, but proceeds as if the attorney had sufficient authority and leaves the party to his action against such attorney if he is financially responsible”

(*id.* at 424-425 [internal quotation marks and citation omitted]). Importantly, the Court recognized the rule did “not apply where the party was at all times a nonresident and out of the jurisdiction. The court may, on motion in the action, grant relief, either by setting aside the judgment, or by staying proceedings and permitting the party to come in and defend” (*id.* at 425 [internal quotation marks and citation omitted]). As discussed earlier, Koukis is not a New York resident. Thus, if Santamarina's appearance was not authorized and Koukis was not served with process, then the court has not acquired jurisdiction over him (*see Vilas v Plattsburgh & Montreal R.R. Co.*, 123 NY 440, 457 [1890]; *Amusement Sec. Corp.*, 251 App Div at 229). The other cases plaintiff refers to, *Park v Regan*, 55 Misc 235, 238 [App Term 1907]) and *Hudson Plush Co. v Romano* (127 NYS2d 342, 343 [Sup Ct, Nassau County 1952]), merely repeat the determination made in *Abbett*. In any event, it is incumbent upon plaintiff to demonstrate it has suffered prejudice from Koukis's purported delay in moving for relief (*see Medical Malpractice Ins. Assn. v District 65-UAW*, 204 AD2d 62, 63 [1st Dept 1994]). Here, unlike the plaintiff in *Abbett*, plaintiff has not demonstrated that it has been unduly prejudiced. Accordingly, Koukis has not waived an affirmative defense predicated upon the lack of personal jurisdiction or improper service, and Santamarina's appearance for him in this action must be vacated.

2. *Personal Jurisdiction Under CPLR 302*

CPLR 5015 (a) (4) allows the court to vacate a judgment for lack of personal jurisdiction. The motion may be made at any time (*see Lull v Van Tassell*, 171 AD3d 1155, 1156 [2d Dept 2019]). ““When a defendant seeking to vacate a default judgment raises a jurisdictional objection pursuant to CPLR 5015 (a) (4), the court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacatur of the default under CPLR 5015 (a) (1)”” (*Caba v Rai*, 63 AD3d 578, 581 n 1 [1st Dept 2009], quoting *Roberts v Anka*, 45 AD3d 752, 753 [2d Dept 2007], *lv dismissed* 10 NY3d 851 [2008]).

Authority for the court to exercise jurisdiction over a non-domiciliary is found in CPLR 301 and 302. General jurisdiction under CPLR 301 exists when a defendant is domiciled here or when ““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 [1st Dept 2017] [internal citation omitted]). Koukis argues, and plaintiff concedes, that the court lacks general jurisdiction over him (oral argument tr at 31). Plaintiff, however, contends that specific or long-arm jurisdiction under CPLR 302 (a) (1) and (a) (2) is proper. Since plaintiff bears the burden of proving jurisdiction (*see O’Brien v Hackensack Univ. Med. Ctr.*, 305 AD2d 199, 200 [1st Dept 2003]), it must show that the exercise of jurisdiction under CPLR 302 is proper and comports with federal due process (*see Williams v Beemiller, Inc.*, 33 NY3d 523, 528 [2019]).

CPLR 302 (a) (1) provides that “a court may exercise personal jurisdiction over a non-domiciliary ... who in person or through an agent ... transacts any business within the state.” Jurisdiction under the statute is determined under a two-prong test. First, “the defendant must have conducted sufficient activities to have transacted business in the state” (*Rushaid v Pictet & Cie*, 28 NY3d 316, 323 [2016], *rearg denied* 28 NY3d 1161 [2017]). Transacting business occurs when

a non-domiciliary ““on his or her own initiative[,] ... 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] [internal citation omitted]). A purposeful activity is one ““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”” (*Rushaid*, 28 NY3d at 323 [internal citation omitted]). “[C]ourts must look at the totality of circumstances concerning the party’s interactions with, and activities within, the state” to determine if the non-domiciliary transacted business here (*see Scheuer v Schwartz*, 42 AD3d 314, 316 [1st Dept 2007], quoting *Bank Brussels Lambert v Fiddler Gonzalez & Rodriguez*, 171 F 3d 779, 787 [2d Cir 1999]). The quality of the defendant’s contacts is key (*see Paterno v Laser Spine Inst.*, 24 NY3d 370, 378 [2014]).

Second, “the claims must arise from the transactions” (*Rushaid*, 28 NY3d at 323). A plaintiff satisfies this by demonstrating an articulable nexus or substantial relationship between the transaction and the claim. “An articulable nexus or substantial relationship exists ‘where at least one element arises from the New York contacts’ rather than ‘every element of the cause of action pleaded’” (*D&R Global Selections, S.L.*, 29 NY3d at 299 [internal citation omitted]). A claim that is “too attenuated” or is “merely coincidental” to a transaction will not suffice (*id.* [internal citation omitted]). Stated another way, the “‘arise-from’ prong limits the broader ‘transaction-of-business’ prong to confer jurisdiction only over those claims in some way arguably connected to the transaction” (*Licci v Lebanese Can. Bank, SAL*, 20 NY3d 327, 340 [2012]). If either prong is not met, CPLR 302 (a) (1) cannot confer jurisdiction (*see Johnson v Ward*, 4 NY3d 516, 519 [2005]). Finally, CPLR 302 (a) (1) is a “single act statute” (*Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71 [2006], *cert denied* 549 US 1095 [2006] [internal quotation marks and citation

omitted)). Hence, “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” (*id.* [internal quotation marks and citation omitted]).

Applying these precepts, plaintiff fails to show that Koukis personally transacted business here (*see America/Intl. 1994 Venture v Mau*, 146 AD3d 40, 53-54 [2d Dept 2016] [concluding that the quality of the contacts an Illinois resident, who had invested in a New York joint venture, had with New York did not support finding that he transacted business]; *cf. CIBC Mellon Trust Co. v HSBC Guyerzeller Bank AG*, 56 AD3d 307, 308 [1st Dept 2008] [finding that the defendants engaged in purposeful activity by investing in a New York hotel business and obtaining a mortgage on property]). A non-domiciliary transacts business in New York when it “seeks out and initiates contact with New York, solicits business in New York, and establishes a continuing relationship” (*Paterno*, 24 NY3d at 377). In this instance, Koukis did not seek out, initiate or solicit business in New York. Elio Jr. testified that his father knew Koukis and “[s]howed him the idea. He liked the idea and decided to invest” (NYSCEF Doc No. 390, Karlan affirmation, exhibit G at 42). Nomellini testified that three of the D’Annas “wanted to bring the company to the United States ... they had the idea and George Koukis invested in the company ... [although] everything was done in London” (NYSCEF Doc No. 389 at 21-22). Discussions with Koukis on whether he would finance Be In’s lawsuit against Google also took place in London and Hong Kong (*id.* at 129-130).

While Nomellini testified that Koukis’s representatives “might have come” to meetings in New York with Be In’s consultants and lawyers (NYSCEF Doc No. 389 at 50-51), his testimony is equivocal as to whether Koukis actively projected himself into this state. Importantly, “[w]hen the visit ... is not for the purpose of initiating or forming a relationship, but is to alleviate problems

under a pre-existing relationship, New York courts have declined to assert jurisdiction” (*United States Theatre Corp. v Gunwyn/Lansburgh Ltd. Partnership*, 825 F Supp 594, 596 [SD NY, 1993]). Similarly, “meetings discussing progress reports and the like generally do not support the exercise of personal jurisdiction” (*MEE Direct, LLC v Tran Source Logistics, Inc.*, 2012 WL 6700067, *3, 2012 US Dist LEXIS 181988, *8 [SD NY, Dec. 26, 2012, No. 12 Civ. 6916 (SAS)]). It appears that Koukis’s representatives did little more than “check in on Be In’s operation” (NYSCEF Doc No. 382, plaintiff’s mem of law at 4). Thus, the record supports the contention that Koukis was a passive investor, which is insufficient for specific jurisdiction (*see Olympus Am., Inc. v Fujinon, Inc.*, 8 AD3d 76, 77 [1st Dept 2004] [denying a motion to dismiss where the defendant “was more than a passive participant, playing a crucial role in creating the substance of these transactions, and thus transacting business in New York” based on his regular telephone calls and emails which generated sales from which he earned his livelihood]; *Certa Dose, Inc. v Copic Ins. Co.*, 2020 NY Slip Op 34010[U], *3 [Sup Ct, Queens County 2020] [declining to find jurisdiction over the defendants who were “merely passive investors”]).

Plaintiff’s contention that Koukis transacted business by wiring \$1 million into Be In’s New York bank account and by extending loans to the company is unpersuasive. “‘Mere payment into a New York bank account does not alone provide a basis for New York jurisdiction,’ especially where the remaining aspects of the transaction occur outside New York” (*MDG Real Estate Global Ltd. v Berkshire Place Assoc., LP*, 513 F Supp 3d 301, 307 [ED NY, 2021], quoting *Pramer S.C.A. v Abaplus Intl. Corp.*, 76 AD3d 89, 96 [1st Dept 2010]); *DirectTV Latin Am., LLC v Pratola*, 94 AD3d 628, [1st Dept 2012], *lv denied* 19 NY3d 812 [2012] [rejecting the contention that depositing funds into a New York account owned by one defendant was sufficient to invoke jurisdiction over an Argentina resident who received funds from that account]; *Magwitch, L.L.C.*

v Pusser's Inc., 84 AD3d 529, 531 [1st Dept 2011], *lv denied* 18 NY3d 803 [2012] [reasoning that “[t]he 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”). The evidence presented shows that the principal discussions regarding Koukis’s investments did not take place in New York, nor did he travel here for that purpose (*see Daewoo Intl. (America) Corp. v Orion Eng'g & Serv. Inc.*, 2003 WL 22400198, *2, 2003 US Dist LEXIS 18696, *6 [SD NY, Oct. 20, 2003, No. 02 Civ. 8809 (RCC)] [stating that the “wiring of money ... is insufficient to establish jurisdiction under New York’s long arm statute” where the plaintiff failed to plead facts showing that significant transactions on the loan took place in the state]). Moreover, plaintiff has not offered any caselaw for the proposition that an out-of-state lender, such as Zeus or Koukis, is amenable to suit brought in New York by a stranger to the loan transaction solely because the proceeds were deposited into a New York account. Plaintiff’s attempt to classify Koukis’s payments as part of an ongoing investment scheme is similarly unconvincing. Plaintiff ignores the subscription agreement and Nomellini’s testimony identifying Zeus, not Koukis, as a Be In shareholder (NYSCEF Doc No. 389 at 25). Likewise, plaintiff has not pleaded facts showing that Koukis acted through Nomellini, or even Zeus, as his agent in transacting business in this state (*see Coast to Coast Energy, Inc. v Gasarch*, 149 AD3d 485, 487 [1st Dept 2017] [stating that “[p]laintiffs failed to allege facts demonstrating that Wampler controlled Gasarch and PSNY’s activities sufficient to support New York jurisdiction”).

As to the second prong, plaintiff fails to identify an articulable nexus between Koukis’s investment in or loans to Be In and the fraudulent conveyance claims (*see America/Intl. 1994 Venture*, 146 AD3d at 58). Plaintiff argues that the funds were disbursed to defendants (oral

argument tr at 32), but Nomellini testified otherwise. Nomellini explained that he opened accounts at Citibank and HSBC for Be In (NYSCEF Doc No. 389 at 87), and that he was the only person with check-writing ability (*id.* at 88). He testified that no dividends or monies were ever paid out to the shareholders or their friends or family (*id.* at 46 and 108-109). Regarding Koukis's initial investment (*id.* at 26), Nomellini stated, "I was sending, wiring it to the UK to pay consultant[s], the engineer, to build the product" (*id.* at 92) and to Be In's attorneys (*id.* at 108). Nomellini described Be In as a "disaster" as "[t]here was no money" (*id.* at 94 and 104-105) and that "the money were [sic] gone before the lawsuit [against Google] started" (*id.* at 108). Nomellini did not know if Be In repaid Koukis's loans (*id.* at 104), and Koukis declined to finance Be In's lawsuit (*id.* at 130-131).

More importantly, plaintiff's claims do not arise from Koukis's investment or loans. Plaintiff primarily complains that Be In fraudulently conveyed its assets to defendants to avoid its creditors (NYSCEF Doc No. 2, ¶¶ 35, 43, 51 and 54). These claims arise from facts unrelated to the investment and loans, and therefore, they do not arise out of Koukis's transaction of business. Under the totality of the circumstances, plaintiff has failed to carry its burden of demonstrating that Koukis purposefully transacted business under CPLR 302 (a) (1).

Plaintiff, though, has demonstrated that jurisdiction under CPLR 302 (a) (2) is proper. CPLR 302 (a) (2) confers jurisdiction over a non-domiciliary "who commits a tortious act within the state." "A cause of action for fraudulent conveyance is a species of tort" (*Morgenthau v A.J. Travis Ltd.*, 184 Misc 2d 835, 843 [Sup Ct, NY County 2000]), and plaintiff has alleged that Be In fraudulently transferred its New York assets to defendants. Use of the New York banking system to fraudulently convey funds for a defendant's own benefit is sufficient to invoke CPLR 302 (a) (2) (*see Bluewaters Communications Holdings, LLC v Ecclestone*, 122 AD3d 426, 468 [1st Dept

2014]). This is sufficient to find that jurisdiction exists (*see CIBC Mellon Trust Co.*, 56 AD3d at 308-309) [stating that participation in a fraudulent conveyance of New York property suffices]; *Weitz v Weitz*, 85 AD3d 1153, 1154 [2d Dept 2011]; *Corpuel v Galasso*, 268 AD2d 202, 202 [1st Dept 2000]; *Ed Moore Adv. Agency v I.H.R., Inc.*, 114 AD2d 484, 486 [2d Dept 1985]). Although Koukis contends that he sustained substantial losses from his investment and loans to Be In, for jurisdiction purposes, the court is “concerned solely with the problem of the court’s jurisdiction over the person of a nonresident defendant and not with the question of his ultimate liability to a particular plaintiff” (*see Longines-Wittnauer Watch Co. v Barnes & Reinecke*, 15 NY2d 443, 460 [1965], *cert denied sub nom. Estwing Mfg. Co. v Singer*, 382 US 905 [1965]). Although some courts have held that the defendant must be present in the state for CPLR 302 (a) (2) to apply (*id.*; *Bensusan Restaurant Corp. v King*, 126 F 3d 25 [2d Cir 1997]), the defendant’s physical presence is no longer necessary (*see Mashreqbank PSC v Ahmed Hamad Al Gosaibi & Bros. Co.*, 101 AD3d 1, 5 n [1st Dept 2012], *rev on other grounds* 23 NY3d 129 [2014]; *Banco Nacional Ultramarino v Chan*, 169 Misc 2d 182, 188-189 [Sup Ct, NY County 1996], *affd sub nom. Banco Nacional Ultramarino v Moneycenter Trust Co.*, 240 AD2d 253 [1st Dept 1997] [finding jurisdiction over a Nigerian company whose “commercial checking account [in New York] was the conduit through which the fraudulent scheme advanced”]).

Long-arm jurisdiction over a non-domiciliary must also comport with federal due process (*see Williams*, 33 NY3d at 528). To that end, a non-domiciliary must “have ‘certain minimum contacts’ with the forum and ‘that the maintenance of the suit does not offend traditional notions of fair play and substantial justice’” (*id.*, quoting *International Shoe Co. v Washington*, 326 US 310, 316 [1945]). “[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 (or third parties)

and the forum State” (*id.* at 529, quoting *Walden v Fiore*, 571 US 277, 284 [2014]). A non-domiciliary looking to defeat jurisdiction “must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable” (*Burger King v Rudzewicz*, 471 US 462, 477 [1985]). Here, jurisdiction over Koukis comports with federal due process (*see Weitz*, 85 AD3d at 1154), and Koukis has not offered a compelling case in response. Although Koukis states that he has sustained substantial losses from his investment and loans, “[f]or jurisdictional purposes, it should suffice that the complaint states a colorable cause of action” (Vincent C. Alexander, 2020 Supp Practice Commentaries, McKinney’s Cons Laws of NY, CPLR C302:5 [Note: online version]). Thus, the motion insofar as it seeks dismissal based on lack of specific jurisdiction is denied.

3. *Improper Service*

“Absent proper service, a default judgment may be vacated at any time, as it is void” (*Green 333 Corp. v RNL Life Science, Inc.*, 191 AD3d 506, 506 [1st Dept 2021] [internal citations omitted]). The plaintiff must strictly comply with the service provisions in CPLR 308 (*see Persaud v Teaneck Nursing Ctr.*, 290 AD2d 350, 351 [1st Dept 2002]). The burden rests with the plaintiff to establish “by a preponderance of the evidence, that service of process was effectuated on defendant and personal jurisdiction was thereby obtained” (*see CitiMortgage Inc. v Scott*, 157 AD3d 507, 507 [1st Dept 2018]).

A properly executed affirmation or affidavit of service constitutes prima facie evidence of proper service (*see Flanagan v Delaney*, 194 AD3d 694, 696-697 [2d Dept 2021]; *San Lim v MTA Bus Co.*, 190 AD3d 493, 493 [1st Dept 2021]). The “mere denial of receipt of service is ‘insufficient to rebut the presumption of proper service created by a properly executed affidavit of service’” (*Matter of de Sanchez*, 57 AD3d 452, 454 [1st Dept 2008] [internal citation omitted]).

Thus, a denial of proper service must be made in non-conclusory fashion (*see Caba*, 63 AD3d at 583), and must be supported by specific, probative facts that rebut the affirmation of service (*see Rudd Mech. Assoc., Inc. v ZDG, LLC*, 192 AD3d 440, 441 [1st Dept 2021]).

Substituted service under CPLR 308 (2) requires delivery of the summons to a person of suitable age and discretion at the individual's actual place of business, dwelling place or usual place of abode and by mailing the summons by first class mail to that individual's last known address or actual place of business within 20 days. As set forth earlier, plaintiff purportedly served Koukis by substituted service pursuant to CPLR 308 (2).¹ Plaintiff maintains that Koukis was served at his actual place of business. An individual's "actual place of business" shall include any location that the defendant, through regular solicitation or advertisement, has held out as its place of business" (CPLR 308 [6]). Plaintiff points to Nomellini's testimony that Be In received mail and telephone calls at 725 Fifth Avenue. However, plaintiff has not produced any evidence that Koukis held out Be In's office as his actual place of business (*see McCord v Larsen*, 132 AD3d 1115, 1117 [3d Dept 2015]), and Koukis expressly denies maintaining a business at 725 Fifth Avenue. Nomellini's position as Be In's agent does not mean he served as Koukis's agent, as well.

Plaintiff cites *Xiao Hong Wang v Chi Kei Li* (169 AD3d 593, 593 [1st Dept 2019]), *Robeck v Prasad* (6 AD3d 690, 690 [2d Dept 2004]) and *Gibson, Dunn & Crutcher LLP v Global Nuclear Servs. & Supply* (280 AD2d 360, 361 [1st Dept 2001]) for the proposition that Koukis held 725 Fifth Avenue out as his actual place of business but, as discussed in an earlier decision (NYSCEF Doc No. 398), those cases are factually dissimilar. Critically, plaintiff has not produced any evidence that Koukis received his mail or telephone calls at 725 Fifth Avenue or that he regularly worked out of that address. Plaintiff also cites *Reliable Abstract Co., LLC v 45 John Lofts, LLC*

¹ Plaintiff does not claim to have served Koukis pursuant to CPLR 308 (3). Thus, the court need not address whether Koukis had designated Nomellini as his agent under CPLR 318.

(152 AD3d 429, 429 [1st Dept 2017]), but that case is distinguishable since there is no evidence that Koukis routinely used 725 Fifth Avenue as his address on agreements and other documents. Moreover, plaintiff mischaracterizes Nomellini's testimony that "the shareholders and Be In were one and the same" (oral argument tr at 29). Nomellini's actually testified that "D'Anna, Be In. They're the same thing" (NYSCEF Doc No. 389 at 43). He made no mention of Koukis.

Counter to plaintiff's position, Koukis's proof is not so speculative as to render the jurisdictional claim conclusory (*see Bedessee Imports, Inc. v Najjar*, 170 AD3d 640, 641 [2d Dept 2019]; *Foster v Jordan*, 269 AD2d 152, 152 [1st Dept 2000]). Koukis has presented specific, probative facts sufficient to rebut the affirmation of service (*see Wells Fargo Bank, N.A. v Jones*, 139 AD3d 520, 523 [1st Dept 2016]). Accordingly, this matter is set down for a traverse hearing to determine whether this court acquired personal jurisdiction over Koukis under CPLR 308 (2). The balance of the motion, including discretionary vacatur under CPLR 5015 (a) (1), shall be held in abeyance pending the hearing.

B. Koukis's Motion to Quash and Plaintiff's Cross Motion for Alternative Service (Motion Sequence No. 015)

Koukis moves, pursuant to CPLR 2303, to quash the subpoena duces tecum and the subpoena ad testificandum, both dated June 22, 2021, on the ground that plaintiff failed to properly serve the subpoenas upon Koukis, who resides in Switzerland. In opposition, plaintiff complains that, although Koukis has avoided all attempts at service of any papers in connection with its attempts to enforce the judgment, service upon Koukis's counsel is proper. Plaintiff also cross-moves for an order authorizing alternative service under CPLR 308 (5).

CPLR 5224 (a) (1) and (a) (2) permits service of a subpoena seeking testimony and a subpoena duces tecum in connection with post-judgment enforcement matters. Such subpoenas must be served in the same manner as a summons (*see* CPLR 2303 [a]; 11 Weinstein-Korn-Miller,

NY Civ Prac: CPLR ¶ 5224.05 [2021] [Note: online treatise]). Koukis demonstrates that plaintiff served the subject subpoenas upon him by email on June 22, 2021 (NYSCEF Doc No. 341, Joseph Aronauer [Aronauer] affirmation, exhibit D at 1), and attempted to personally serve them upon his attorneys at their offices in New York, although no one was present to accept service (NYSCEF Doc No. 342, Aronauer affirmation, exhibit D at 1). These attempts at service do not comport with the requirements of CPLR 2303 (a). Moreover, plaintiff has not shown that such service upon Koukis, an out-of-state resident, was authorized (*see Siemens & Halske, GmbH. v Gres*, 37 AD2d 768, 768 [1st Dept 1971]) in the absence of an order permitting alternative service by email (*see Alfred E. Mann Living Trust*, 78 AD3d at 142). Plaintiff's attempt to serve the subpoenas upon Koukis's counsel in New York also fails in the absence of an order permitting alternative service and where, as above, Koukis challenges whether jurisdiction was ever acquired over him (*see Coutts Bank (Switzerland) v Anatian*, 275 AD2d 609, 611 [1st Dept 2000] [Sullivan, P.J., concurring] [concluding that service of a subpoena upon an out-of-state judgment debtor's attorneys in New York was permissible where the court had obtained jurisdiction over the defendant in the underlying action]). Consequently, Koukis's motion to quash the subpoena duces tecum dated June 22, 2021 and the subpoena ad testificandum dated June 22, 2021 is granted.

Plaintiff's cross motion for an order permitting the use of alternative service under CPLR 308 (5) is denied at this time. CPLR 308 (5) grants the court discretion in directing an alternative method for service if service is impracticable under CPLR 308 (1), (2) and (4) (*see generally Liebeskind v Liebeskind*, 86 AD2d 207 [1st Dept 1982], *aff'd* 58 NY2d 858 [1983]). However, in view of the pending traverse hearing, an order allowing service upon Koukis to be made by way of his attorneys is premature if it is determined that he was not properly served with process.

Accordingly, it is hereby:

ORDERED that this matter having come on before this court on June 30, 2021 on motion of defendant George Koukis to, inter alia, vacate the default judgment entered against him (motion sequence no. 014), and the plaintiff Gibson, Dunn & Crutcher LLP having appeared by Mitchell A. Karlan, Esq., and the defendant George Koukis having appeared by Henry H. Korn, Esq., and Joseph Aronauer, Esq. and, pursuant to CPLR 4212, the court having on its own motion determined that the appointment of a referee to hear and report is appropriate; it is now hereby

ORDERED that a Judicial Hearing Officer (“JHO”) or Special Referee shall be designated to hear and report to this court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

- (1) the issue of whether the court has acquired personal jurisdiction over defendant George Koukis under CPLR 308 (2); and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the “References” link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the “References” link on the court’s website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the plaintiff shall serve a pre-hearing memorandum within 24 days from the date of this order and the defendant shall serve objections to the pre-hearing memorandum within 20 days from service of plaintiff’s papers and the foregoing papers shall be filed with the Special Referee Clerk prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the “References” link on the court’s website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

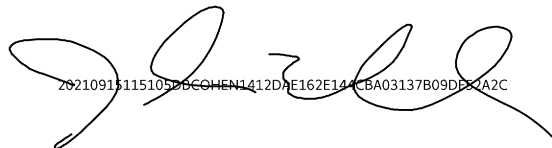
ORDERED that the branch of the motion brought by defendant George Koukis to vacate the appearance of Santamarina & Associates on his behalf in this action is granted, and the answer filed by Santamarina & Associates for defendant George Koukis (NYSCEF Doc No. 14) and the stipulation executed December 11, 2017 on his behalf (NYSCEF Doc No. 12) are stricken and the appearance of Santamarina & Associates for defendant George Koukis in this action is deemed a nullity; and it is further

ORDERED that Henry H. Korn, Esq., and Joseph Aronauer, Esq. shall each serve and file a notice of appearance for defendant George Koukis in this action in accordance with CPLR 321; and it is further

ORDERED that, unless otherwise directed by this court in any Order that may be issued together with this Order of Reference to Hear and Report, the balance of the issues presented in any motion identified in the first paragraph hereof (motion sequence no. 014) shall be held in abeyance pending submission of the Report of the JHO/Special Referee and the determination of this court thereon; and it is further

ORDERED that the motion of defendant George Koukis seeking to quash a subpoena duces dated June 22, 2021 and a subpoena ad testificandum dated June 22, 2021 and served by plaintiff Gibson, Dunn & Crutcher LLP (motion sequence no. 015) is granted, and said subpoenas are hereby quashed; and it is further

ORDERED that the cross motion of plaintiff Gibson, Dunn & Crutcher LLP for permission to effect alternative service of a subpoena duces tecum and a subpoena ad testificandum (motion sequence no. 015) is denied without prejudice to renew pending the resolution of motion sequence no. 014.



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9/15/2021

DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE