

Zenith Capital Corp. v AE Quality Trades Inc.

2024 NY Slip Op 32763(U)

July 25, 2024

Supreme Court, Kings County

Docket Number: Index No. 506565/2024

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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ZENITH CAPITAL CORP.,

Plaintiff,

Decision and order

- against -

Index No. 506565/2024

AE QUALITY TRADES INC., ANDREA ESTEVEZ,
RE MIXED CONSTRUCTION, INC., and CHARY
RUIZ ESTEVEZ,

Defendants,

July 25, 2024

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PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #1 & #2

The defendant's Re Mixed Construction Inc., and Chary Ruiz Estevez have moved pursuant to CPLR §3211 seeking to dismiss the complaint on the grounds the court does not maintain jurisdiction over them. The plaintiff has cross-moved seeking to compel the defendants to respond to discovery demands. The motions have been opposed respectively and arguments have been held. Papers have been submitted by the parties and after reviewing all the arguments this court now makes the following determination.

According to the complaint, an investment opportunity was in the process of being negotiated between the plaintiff and others. The complaint alleges the defendant AE Quality Trades Inc., or the other defendants intercepted an email regarding wiring instructions for those investments and lured the investors to essentially send the investment funds to the defendants Citibank account which was opened in New York City. The plaintiff alleges that on October 26 and October 27 2022 the defendants stole one million, four hundred thousand dollars from Zenith's investors. Zenith reimbursed the investors and has brought this action

seeking recovery of the diverted funds. The complaint alleges causes of action for fraud, conversion, common law conspiracy, unjust enrichment and civil RICO. The defendants have now moved seeking to dismiss the action on the grounds they were never served with process and in any event the court does not maintain jurisdiction over them. A motion for discovery has been filed and as noted the motions are opposed.

According to the complaint jurisdiction is based upon either the commission of a tort in New York, conducting business in New York or actual residence in New York.

Concerning the commission of a tort in New York, CPLR §302(a)(2) provides that New York courts maintain jurisdiction over any non-domiciliary who commits a tortious act within New York. Further, the above statute only applies if the defendant was physically present in the state when the tort was committed (see, Feathers v. McLucas, 15 NY2d 443, 261 NYS2d 8 [1965], Bensusan Restaurant Corp. v. King, 126 F3d 25 [2d Cir. 1997]). As the Practice Commentaries colorfully explain, "if a New Jersey domiciliary were to lob a bazooka shell across the Hudson River at Grant's tomb, Feathers would appear to bar the New York courts from asserting personal jurisdiction over the New Jersey domiciliary in an action by an injured New York plaintiff" (see, Practice Commentaries C302:17). The commentaries continue and explain that "as construed by the Feathers decision, jurisdiction

cannot be asserted over a nonresident under this provision unless the nonresident commits an act in this state. This is tantamount to a requirement that the defendant or his agent be physically present in New York....In short, the failure to perform a duty in New York is not a tortious act in this state, under the cases, unless the defendant or his agent enters the state" (id).

The plaintiff insists that physical presence in the state is not required as long as the tort was committed in New York. The plaintiff cites three cases in support of that proposition. The first, Parke-Bernet Galleries v Franklyn, 26 NY2d 132, 308 NYS2d 337 [1970] concerned CPLR §302(a)(1) and not CPLR §302(a)(2) and thus is not pertinent to this decision. The second, Kreutter v McFadden Oil Corp., 71 NY2d 460, 527 NYS2d 195 [1988] also concerned CPLR §302(a)(1) and not CPLR §302(a)(2). While the case did mention CPLR §302(a)(2) it categorically did not hold that physical presence is not required to establish jurisdiction based upon the commission of a tort. Lastly, Rushaid v Pictet & Cie, 28 NY3d 31, 145 NYS3d 276 [2016] also dealt with CPLR §302(a)(1) and not CPLR §302(a)(2). Thus, there are no cases that dispense with the physically present requirement to assert jurisdiction pursuant to CPLR §302(a)(2). Thus, the defendant must be physically present in the state even where the injury occurs within the state.

Concerning conducting business in New York pursuant to CPLR

302(a)(1), in Johnson v. Ward, 4 NY3d 516, 797 NYS2d 33 [2005] the court held that "long-arm jurisdiction over a nondomiciliary exists where (i) a defendant transacted business within the state and (ii) the cause of action arose from that transaction of business. If either prong of the statute is not met, jurisdiction cannot be conferred under CPLR 302(a)(1)" (id). In Agency Rent A Car System Inc., v. Grand Rent A Car Corp., 98 F3d 25 [2d Cir. 1996] the court explained that "the question of whether an out-of-state defendant transacts business in New York is determined by considering a variety of factors, including: (i) whether the defendant has an on-going contractual relationship with a New York corporation... (ii) whether the contract was negotiated or executed in New York, and whether, after executing a contract with a New York business, the defendant has visited New York for the purpose of meeting with parties to the contract regarding the relationship... (iii) what the choice-of-law clause is in any such contract... and (iv) whether the contract requires franchisees to send notices and payments into the forum state or subjects them to supervision by the corporation in the forum state... Although all are relevant, no one factor is dispositive. Other factors may also be considered, and the ultimate determination is based on the totality of the circumstances" (id). Thus, a non-domiciliary may be subject to the jurisdiction of New York courts where that individual "transacts any business within the state or

contracts anywhere to supply goods or services in the state" (CPLR §302(a)). "Although it is impossible to precisely fix those acts that constitute a transaction of business" case law has established that "it is the quality of the defendants' New York contacts that is the primary consideration" (see, Fischberg v. Doucet, 9 NY3d 375, 849 NYS2d 501 [2007]).

The defendant Chary Ruiz Estevez as the owner of defendant Re Mixed Construction Inc., submitted an affidavit which states that he never resided in New York and that neither he nor his company ever conducted business in New York. Thus, the burden of proof the defendants maintained sufficient connections to New York now falls upon the plaintiff (see, Pichardo v. Zayas, 122 AD3d 699, 996 NYS2d 176 [2d Dept., 2014]).

The plaintiff asserts that evidence of conducting business exists by virtue of transfers from defendant AE Quality Trades Inc., to Re Mixed Construction Inc., as reflected in bank statements and wire transfers. However, none of the bank statements or wire statements implicate the moving defendants at all.

Next, the plaintiff argues that the defendants engaged in a civil conspiracy and that consequently jurisdiction may be asserted upon the moving defendants as agents of the remaining defendants. While New York does not recognize an independent cause of action for civil conspiracy (Plymouth Drug Wholesalers

Inc., v. Kirschner, 239 AD2d 479, 658 NYS2d 64 [2d Dept., 1997]) it does permit jurisdiction based upon conspiracy-like activity (Lawati v. Montague Morgan Slade Ltd., 102 AD3d 427, 961 NYS2d 5 [1st Dept., 2013]). Thus, to establish such jurisdiction the plaintiff must demonstrate "(a) the defendant had an awareness of the effects in New York of its activity; (b) the activity of the co-conspirators in New York was to the benefit of the out-of-state conspirators; and (c) the co-conspirators acting in New York acted at the direction or under the control, or at the request of or on behalf of the out-of-state defendant" (id). In this case the complaint alleges that Re Mixed Construction Inc. "received portions of the Zenith funds disbursed from the AE account" and used the funds for its own benefit and that Chary Ruiz Estevez directed Re Mixed Construction Inc. "to receive portions of the Zenith funds disbursed from the AE account" (see, Complaint, ¶48(d), (e) [NYSCEF Doc. No. 2]). Thus, the plaintiff has sufficiently established jurisdiction and the motion seeking to dismiss based upon these grounds is denied.

Turning to the issue of service, generally a process server's affidavit provides prima facie evidence of proper service (Household Finance Realty Corp., of New York v. Brown, 13 AD3d 340, 785 NYS2d 742 [2d Dept., 2004]). To contend that service was improper and that defendant is entitled to a hearing on the matter, the defendant must allege facts to support the

contention (Mortgage Electronic Registration Systems, Inc., v. Schotter, 50 AD3d 983, 857 NYS2d 592 [2d Dept., 2008, Hannover Insurance Company v. Cannon Express Corp., 1 AD3d 358, 766 NYS2d 853 [2d Dept., 2003])). The affidavit of the process server, William Laguer, states that on March 7, 2024 he personally served the defendant Chary Ruiz Estevez at a location in New Jersey (see, Affidavit of Service [NYSCEF Doc. No. 10]). In opposition to the affidavit of Mr. Laguer, the defendant has introduced an affidavit denying he was ever served and insisting he was not even in the United States on that date (see, Affidavit of Chary Ruiz Estevez, ¶2 [NYSCEF Doc. No. 17]). The passport of Mr. Estevez does not conclusively establish he could not have been present in the United States on March 7, 2024. The passport merely confirms she had been out of the country at some earlier dates. Therefore, there are questions of fact whether service of process was properly effectuated. Consequently, the parties will be notified about a hearing on the issue of service.

The cross-motion seeking discovery is denied at this time without prejudice and may be renewed upon the conclusion of the hearing concerning service.

So ordered.

ENTER:

DATED: July 25, 2024
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC