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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

20@LLC, PAUL MISIR, and WILLIAM SANFORD,

Plaintiff,

-against-

SEAN LYNDE a/k/a SEAN MACKENZIE, SEAN LINDE and JORGE DEYARZA and MARISSA MILLER,

Defendants.

TRIAL/IAS, PART 41
NASSAU COUNTY
INDEX NO.: 4310-12

MOTION SUBMISSION DATE: 6-8-12

MOTION SEQUENCE NOS. 1 and 002

The following papers read on this motion:

Notice of Motion (Mot. Seq. 1), Affirmation, and Exhibits	X
Affidavit in Support of Motion to Dismiss (Miller)	X
Affidavit in Support of Motion to Dismiss (DeYarza)	X
Affidavit	X
Plaintiff's Memorandum of Law in Opposition	X
Defendants' Memorandum of Law in Support of Motion to Dismiss	X
Defendants Reply Memorandum of Law	X
Reply Affidavit (DeYarza)	X
Reply Affidavit (Miller)	X
Amended Notice of Motion To Dismiss	X
Defendant Mackenzie Memorandum of Law	X
Affidavit (Sanford)	X
Affidavit (Misir)	X
Reply Affidavit	X
Defendant MacKenzie Reply Memorandum of Law	X

Motion pursuant to CPLR 3211(a)(4) by defendants Jorge DeYarza (DeYarza) and Marissa Miller (Miller) to dismiss the complaint or, in the alternative to stay the action pursuant to CPLR 2201 is denied.

Amended notice of motion by defendant Sean Lynde a/k/a Sean Mackenzie (Sean Mackenzie) pursuant to CPLR 3211(a)(4) or CPLR 3211(a)(8) to dismiss the complaint, or, in the alternative, to stay this action and to impose sanctions on plaintiffs or plaintiffs' counsel pursuant to 22 NYCRR § 130-1.1 is denied.

BACKGROUND

In this action plaintiffs seek to recover damages arising from defendants' alleged tortious conduct including, *inter alia*, fraud, impersonation, malicious interference with contract, defamation, tortious interference with prospective economic gain and copyright and property theft. Plaintiffs allege that after the parties' business relationship deteriorated in 2011, defendants engaged in a course of conduct resulting in plaintiffs decision to prepare a lawsuit against them. Plaintiffs allege that defendants DeYarza and Miller preemptively filed suit against them in the United States District Court: Southern District of New York in March of 2012 to recover unpaid salary when they learned that plaintiffs were planning to sue them in state court.

In the federal complaint, DeYarza and Miller allege, *inter alia*, that their employment agreements with 20@LLC were terminated as of December 15, 2011; 20@LLC failed to pay them the federally mandated minimum wage for the period May 1, 2011 to December 15, 2011; failed to pay back salary due and owing

pursuant to a written agreement during the period November, 2011 through January 15, 2012; and misappropriated and are using intellectual property belonging partly and/or exclusively to DeYarza and Miller. As former employees of 20@LLC,[1] defendants DeYarza and Miller cite violations of Federal Labor Standards Act and the New York State Labor Law (FSLA) and misappropriation of intellectual property that was conceived of and/or developed by them.

Although the federal complaint was filed on March 22, 2012, the defendants in that action were not served[2] with the complaint herein until after a letter was sent to Paul Misir, part owner and managing member of 20@LLC, on behalf of DeYarza and Miller demanding:

> "a check in the amount of $50,000 as payment for [their] back salary and the value of [their] intellectual property that 20@LLC is now using or plans to use."

The letter advised that, should 20@LLC fail to comply with DeYarza and Miller's demand, copies of the summons and complaint would be served upon him and the

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[1]Plaintiff 20@LLC is a social media startup company based in New York City.

[2]The summons and complaint in the federal action were served on Paul Misir and 20@LLC on April 11, 2012; on Vikas Singhal on April 17, 2012 and on William Sanford on April 24, 2012. The instant action was filed on April 4, 2012 on which date defendants DeYarza and Miller were served. Defendant Sean Lynde a/k/a Sean Mackenzie was served on April 19, 2012.

other members of 20@LLC to recover double the amount of the unpaid salary plus attorney's fees.

Defendants DeYarza and Miller seek dismissal of this action pursuant to CPLR 32121(a)(4) contending that the federal action was filed almost two weeks before plaintiffs responded with their retaliatory summons and complaint; the defendants and the plaintiffs herein are, with the exception of defendant Sean Mackenzie, parties to the federal action which arose out of the same set of facts and circumstances as the action at bar; and the relief sought is substantially the same in both actions i.e., recovery of money owing in connection with their failed employment relationship.

Plaintiffs counter that the federal court and state court actions involve different sets of plaintiffs and defendants; the causes of action and the relief sought in each suit is different in that the federal action involves wage and intellectual property claims and the state court action involves different tort causes of action including fraud, impersonation, extortion, property theft, cyber-harassment, defamation and tortious interference with prospective economic gain. Plaintiffs in the state action seek damages and relief in the amount of $17 million while, in the federal court action, DeYarza and Miller as plaintiffs claim wages

under the FLSA on which they attempt to bootstrap two New York Labor Law claims and a breach of contract claim.

Plaintiffs argue that since the state and federal cases do not assert the same causes of action, nor seek the same relief, the instant action should not be dismissed.

ANALYSIS

While technical priority in the commencement of an action is a factor to be considered in determining whether dismissal pursuant to CPLR 3211(a)(4) is appropriate, it is not necessarily dispositive. *AIG Fin. Prods. Corp. v Penncara Energy, LLC*, 83 AD3d 494, 496 [1st Dept 2011]; *San Ysidro Corp. v Robinow*, 1 AD3d 185, 186 [1st Dept 2003].

CPLR 3211(a)(4) vests the court with broad discretion in considering whether to dismiss an action on the ground that there is another action pending where there is a substantial identify of the parties, the two actions are sufficiently similar and the relief sought is substantially the same. *DAIJ, Inc. v Roth*, 85 AD3d 959 [2nd Dept 2011] (citations and quotation marks omitted). The critical element is that both suits arise out of the same subject matter or series of alleged wrongs. *Cherico, Cherico and Assoc. v Midollo*, 67 AD3d 622, 623 [2nd Dept 2009]. It is

not necessary that the precise legal theories presented in the first action also be presented in the second action. Rather it is sufficient if the two actions are sufficiently similar and the relief sought is the same or substantially the same. *Simonetti v Larson*, 44 AD3d 1028, 1029 [2nd Dept 2007].

The presence of additional parties will not necessarily defeat a CPLR 3211(a)(4) motion where both suits arise out of the same subject matter or series of alleged wrongs. *White Light Prods. v On the Scene Prods.*, 231 AD3d 90, 94 [1st Dept 1997]. A motion to dismiss pursuant to CPLR 3211(a)(4) should be granted where there is a danger of conflicting rulings on the same matter. *Diaz v Philip Morris Cos., Inc.*, 28 AD3d 703, 705 [2nd Dept 2006].

A comparison of the complaint in the federal action with the complaint herein establishes that, while the parties are substantially the same, with the exception of defendant herein, Sean Mackenzie, the two actions are neither substantially similar *vis-a-vis* the claims alleged nor seek substantially similar relief. There is, therefore, no basis to dismiss the complaint in this action on CPLR 3211(a)(4) grounds.

Although he is not a party to the federal action, defendant Mackenzie has moved to dismiss the complaint pursuant to CPLR 3211(a)(4) as well as CPLR 32111(a)(8).

With respect to jurisdiction, defendant Mackenzie attests that he is a resident of the state of Maine and was not a resident of New York State during the entirety of his employment with plaintiff 20@LLC or thereafter. He further asserts that he does not own any property in New York; does not maintain office space or place of business in New York; does not regularly conduct or solicit business in New York; does not maintain a single active website or other public online account for the purpose of soliciting business within New York, or anywhere outside the state; and has not traveled to New York for the primary purpose of practicing his craft i.e., professional print and web design services for companies in various industries across the United States, in the last eighteen months.

During the period April, 2011 through November 2011, defendant Mackenzie alleges that he provided design services for plaintiff 20@LLC while working remotely from his home in Maine. He claims that, during that period, he did not perform work duties at 20@LLC's office in Manhattan. As such, he contends that he is not subject to the jurisdiction of the New York courts. Despite an e-mail dated December 29, 2011 from 20@LLC's chief operating officer, plaintiff William Sanford, stating that defendant MacKenzie would receive

his final wages "once we settle on the invoice," said defendant asserts that he never received the wages that were allegedly owned him.

Plaintiffs counter that the court has general jurisdiction over defendant Sean Mackenzie inasmuch as he was a domiciliary of New York State as of April 19, 2012 when this action was commenced. In this regard, plaintiffs argue that defendant obtained a New York State driver's license in 2009; resided in New York City and maintained a website from which he solicited business stating that Sean Lynde (i.e., Mackenzie) a graphic designer, was based in New York.

Plaintiffs further maintain that defendant Mackenzie is subject to the long arm jurisdiction of the court pursuant to CPLR 302(a)(1) because plaintiffs' claims arise out of defendant's transaction of business within the state. Plaintiffs assert that, as of April 26, 2009, defendant maintained a website from which he solicited business and transacted business in New York State through e-mail and other electronic means. Plaintiffs also contend that defendant Mackenzie, who they claim derives substantial revenue from interstate commerce, is subject to jurisdiction under CPLR 302(a)(3) having committed tortious acts outside of the state which he expected, or should have reasonably expected, would have consequences in the state.

According to the affidavits of two process servers, defendant Mackenzie was served with the summons and complaint in this matter in New Hampshire by the posting of same at his last and usual address at 68 Woodlawn Drive, Pelham, New Hampshire at 12:34 PM on April 20, 2012 followed by first class mail on April 24, 2012 and in Maine by personal service at 81 Silver Street, Limerick, Maine on April 19, 2012 at 10:21 AM.

On a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of demonstrating satisfaction of the CPLR and due process jurisdictional requirements. *LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214, 216 [2000]. Since the ultimate burden of proof on the issue of jurisdiction rests with the party asserting jurisdiction, that party must show, *prima facie*, that the defendant is subject to the personal jurisdiction of the court in order to defeat a motion to dismiss based on a lack of long arm jurisdiction. *College v Brady*, 84 AD3d 1322 [2nd Dept 2011]. To determine whether a non-domiciliary may be sued in New York, the court must first determine whether New York's long arm statute confers jurisdiction over the non-domiciliary in light of his contacts with the state.

If the defendant's relationship with New York comes within the ambit of CPLR 302, the court must then determine whether the exercise of jurisdiction

comports with constitutional due process. *LaMarca v Pak-Mor Mfg. Co.*, *supra* at p. 216; *Opticare Acquisition Corp. v Costello*, 25 AD3d 238, 247 [2nd Dept 2005].

Pursuant to CPLR 302(a)(1), a court may exercise personal jurisdiction over any non-domiciliary who in person or through an agent transacts any business in the state and there is an articulable nexus between the transaction and plaintiff's cause of action against the defendant. *Executive Life Ltd. v Silverman*, 68 AD3d 715, 716 [2nd Dept 2009]. By this single act statute, proof of one transaction in New York is sufficient to invoke jurisdiction even if defendant never enters New York, so long as the defendant's activities in New York were purposeful and there is a substantial relationship between the transaction and the claim asserted. *Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71 [2006] (quotation marks omitted).

Where, as here, a defendant engages in purposeful activity here, personal jurisdiction is proper because the defendant has availed itself of the benefits of the forum thereby invoking the benefits and protections of New York's laws. Purposeful activities encompass volitional acts by defendant whereby he avails himself of the privilege of conducting activities within the forum state. *Daniel B. Katz & Assoc. Corp. v Midland Rushmore, LLC*, 90 AD3d 977, 979 [2nd Dept 2011]; *Executive Life Ltd. v Silverman*, 68 AD3d 715, 716-717 [2nd Dept 2009]

(citations and quotation marks omitted). Electronic communications, telephone calls or letters, in and of themselves, generally may not be enough to establish jurisdiction. They may, however, be sufficient if used by the defendant deliberately to project himself into business activities occurring with New York State. *Fishbarg v Doucet*, 38 AD3d 270, 271 [1st Dept 2007]. As the Court of Appeals observed in *Kreutter v McFadden Oil Corp.*, 71 NY2d 460 4 [1988],

> "with the growth of national markets for commercial trade and technological advances in communication and travel systems, . . . an enormous volume of business may be transacted within a state without a party ever entering it."

The record establishes that whether or not defendant Mackenzie was a domiciliary of New York State at the commencement of this action, he purposely established a continuing relationship with the plaintiffs *vis-a-vis* certain design projects thereby availing himself of the benefits of doing business in the forum (New York). It is undisputed that there is a substantial relationship between the transaction at issue and the claims asserted by plaintiffs and that the claims arise from the subject transaction.

The exercise of long arm jurisdiction over defendant Mackenzie in the circumstances extant would not be inconsistent with the traditional notions of due process, fair play and substantial justice. Under the totality of the circumstances,

defendant Mackenzie has sufficient minimum contacts with New York and should reasonably expect to defend his actions in this state.

Dated: July 30, 2012

STEVEN M. JAEGER, A.J.S.C.