

Verse Group LLC v Edwards
2012 NY Slip Op 33355(U)
July 25, 2012
Supreme Court, New York County
Docket Number: 650030/2012
Judge: Shirley Werner Kornreich
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SHIRLEY WERNER KORNREICH J.S.C.

PART 54

Index Number : 650030/2012
VERSE GROUP LLC
vs.
EDWARDS, MARCY
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for
Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s) 6
Answering Affidavits — Exhibits No(s) 9-11
Replying Affidavits No(s) 12

Upon the foregoing papers, it is ordered that this motion is decided by accordance with the annexed decision/order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/25/12

SHIRLEY WERNER KORNREICH J.S.C. J.S.C.

- 1. CHECK ONE: CASE DISPOSED, NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X

VERSE GROUP LLC,

Plaintiff,

-against-

MARCY EDWARDS,

Defendant.

-----X

SHIRLEY WERNER KORNREICH, J.

DECISION & ORDER

Index No.: 650030/2012

In this action, plaintiff, Verse Group, LLC (Verse), alleges that defendant, Marcy Edwards, aided and abetted non-party Michael Thibodeau to embezzle and defraud the company.¹ Edwards moves to dismiss the action for lack of personal jurisdiction [CPLR §3211 (a) (8)] and for improper service [CPLR 3211 §(a)(9)]. Plaintiff opposes.

I. Background

A. Complaint

The complaint alleges that Thibodeau and Randall Ringer were each 50% and managing members of plaintiff, a New York LLC with offices in Manhattan. The company provides marketing, branding and design services to other companies. Pursuant to an Operating Agreement, Thibodeau and Ringer were not permitted to possess an interest in other business ventures of any nature similar to those of plaintiff.

In 2009, Thibodeau became romantically involved with Edwards, who was employed by Marriott, a client of Verse, and lived in Phoenix, Arizona.. In 2010, Thibodeau relocated to San Francisco, and he and Ringer agreed to open a company office in San Francisco. The San

¹ Pursuant to contract, the action against Thibodeau is in arbitration.

Francisco office sublet space from Weber Shandwick, a company for which Verse provided services.

On June 19, 2011, Thibodeau suffered a stroke that left him severely impaired. Shortly thereafter, Ringer requested Thibodeau's computer from Edwards to access company records. When Edwards refused the request, Ringer became suspicious. He later obtained limited access to the computer from Thibodeau's family and, as a result, allegedly learned that: Thibodeau competed with Verse, using Verse resources but invoicing the services from his New York residential address; Thibodeau embezzled funds from Verse; one of the business projects diverted was Discover Beauty, whose co-founder was Dr. Douglas Scherr, a New York City doctor, and the money diverted from Verse for this project went to Edwards; and Edwards aided Thibodeau in diverting approximately twenty projects from Verse and concealing money improperly diverted or embezzled from Verse.

B. The Motion to Dismiss

Edwards submits an affidavit averring that she is and always has been a resident and domiciliary of Arizona. Further, she attests that she works for Marriott International, marketing Arizona and California properties on a non-exclusive basis. She states that she works out of her Arizona home, owns no property or bank accounts in New York and transacts no business in New York. She admits that she attended a three day business trip in New York in 2010 and stayed at the Brooklyn Marriott, but contends that she has not been in New York since. Finally, she avers that she received the summons and complaint on January 18, 2012, upon returning home from a business trip. It was in a Federal Express envelope and had been mailed from the JW Marriott in Phoenix, by the Human Resources Department. The envelope contained a business card from Bryan Curry, a process server.

The affidavit of service indicates that Bryan Curry served process upon a woman at Edward's place of business, the JW Marriott in Phoenix. The affidavit also states that a copy was mailed to the same address and marked "personal and confidential".

Edwards denies that she has an office at the JW Marriott in Phoenix or that she is an employee of JW Marriott. Rather, she states that she works for Marriott International and JW Marriott is one of several properties which she markets. She avers that she works from her home. She further maintains that she never contacted Dr. Scherr of Weill Cornell, New York. Arguing that plaintiff did not mail a copy of the summons and complaint to her home address and did not serve her at her proper place of business, Edwards moves to dismiss for improper service of process. Additionally, she contends the court has no long-arm jurisdiction over her.

Plaintiff asserts that Edwards is amenable to jurisdiction pursuant to New York's long-arm statute, specifically CPLR §§302(a)(1) and 302 (a)(3). It contends that Edwards received \$12,000 from Dr. Scherr in New York City and submits an email thread to support the allegation. Ringer Affidavit Ex. I. Plaintiff argues that Edwards and Thibodeau acted together as agents in a conspiracy. It submits an e-mail thread between Thibodeau and Edwards to prove that she aided and abetted Thibodeau. Ringer Affidavit Ex. J. The e-mails indicate that a credit check was being run, allegedly, upon a potential client. Moreover, plaintiff submits a business card and an e-mail thread in which Edwards represented herself to be an employee of JW Marriott, whose offices were at that Phoenix resort where process was served.

II. Discussion

A. Service of Process

Service of process outside of New York may be effectuated "in the same manner as service is made within the state." CPLR §313. Substitute service is accomplished by delivering

the summons “to a person of suitable age and discretion at the actual place of business...and by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend “personal and confidential.” CPLR §308(2).

Here, both parties agree that service was effected by service upon an employee at the JW Marriott in Phoenix. The sole issue is whether defendant’s place of business was the JW Marriott. Edwards’ business card and an e-mail sent by her, however, states that her place of business is the JW Marriott, 5350 East Marriott Drive, Phoenix, Arizona -- the place of service. A defendant can have more than one place of business for the purpose of service of process. *Gibson, Dunn and Crutcher LLP v Global Nuclear Servs & Supply Ltd.* 280 AD2d 360, 361 721 NYS2d 315, 317 (1st Dept 2001); NY Civ Prac L & R 308 (6). Edwards is precluded from denying the JW Marriott address is her "actual place of business," since she put forth that address both on her business card and in a business e-mail. *See Vid v Kaufman* 282 AD 2d 739 (2d Dept 2001) citing to CPLR §308(6) (actual place of business is any location which defendant, through regular solicitation or advertisement, held out as place of business.). Consequently, Edwards claim that service was improper is denied.

B. Long-Arm Jurisdiction

Plaintiff bears the burden of proof of long-arm jurisdiction or, alternatively, must demonstrate a sufficient start warranting jurisdictional discovery. *Peterson v Spartan Indus.*, 33 NY2d 463 (1974). To warrant discovery, the plaintiff need only show that facts may exist to demonstrate jurisdiction and those facts are within defendant’s control. *Id.* at 466. Here, plaintiff asserts that jurisdiction exists under CPLR §§302(a)(1) and (3).

CPLR §302(a)(1) provides that a New York court has long-arm jurisdiction over a non-domiciliary, who “in person or through an agent transacts any business within the state or

contracts anywhere to supply goods or services in the state.” CPLR 302 (a)(1) is a single act statute, which only requires proof of one transaction in 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.” *Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 (1988). “The test is whether the defendant has engaged in some purposeful activity in New York in connection with the matter in controversy.” *Otterbourg, Steindler, Houston & Rosen, P.C. v Shreve City Apts., Ltd.*, 147 AD2d 327, 331 (1st Dept 1989). The statute mimes the requirements of constitutional due process that permits a court to exercise jurisdiction over a non-domiciliary when she “avails [her]self of the benefits of the forum, has sufficient minimum contacts with it, and should reasonably expect to defend [her] actions there.” *id.* at 466.

CPLR §302(a)(3)(ii) provides long-arm jurisdiction over an out-of-state defendant when she “commits a tortious act without the state causing injury to person or property within the state” and “expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.” “In the context of a commercial tort, where the damage is solely economic, 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.” *CRT Invs., Ltd. v BDO Seidman, LLP*, 85 AD3d 470, 472 (1st Dept 2011); *see also Pramer S.C.A. v Abaplus Intl. Corp.*, 76 AD3d 89, 97-8 (1st Dept 2010)(situs of injury for long-arm purposes is where event giving rise to injury occurred).

In this case, most of the alleged actions giving rise to the alleged tortious conduct, took place in California or Arizona. However, Edwards does not deny and a submitted e-mail indicates that services were provided to Dr. Scherr and that Edwards received \$12,000 from Dr. Sherr’s New York entity. This showing together with the fact that plaintiff has been denied

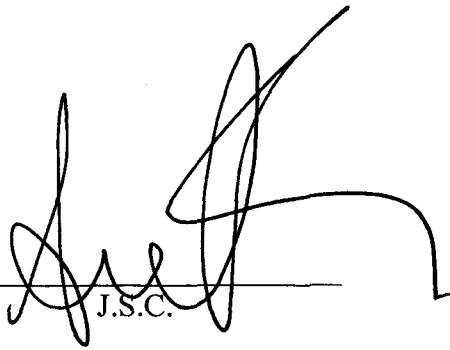
access to Thibodeau's computer makes a sufficient start to warrant jurisdictional discovery pursuant to CPLR §302(a)(1). Accordingly, it is

ORDERED that defendant's motion to dismiss the complaint is denied; it is further

ORDERED that the parties are to appear in Part 54 for a preliminary conference on August 9, 2012.

Dated: July 25, 2012

Enter



J.S.C.