

Itria Ventures LLC v Spire Mgt. Group, Inc.
2017 NY Slip Op 30194(U)
January 30, 2017
Supreme Court, New York County
Docket Number: 152407/16
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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ITRIA VENTURES LLC,

Index No. 152407/16

Plaintiff,

Mot. seq. no. 001

-against-

DECISION AND ORDER

SPIRE MANAGEMENT GROUP, INC., BHAVIKA
KANITAL PATEL, and RUNJAN ASHOK JAIN,

Defendants.

-----X
BARBARA JAFFE, J.:

For plaintiff:
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Law Offices of Edward Weissman
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212-937-1520

For defendant Patel:
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By notice of motion, defendant Bhavika Kantilal Patel, sued incorrectly as Bhavika Kanital Patel, moves for an order dismissing the complaint against her pursuant to CPLR 3211(a)(7) for failure to state a claim or, alternatively, CPLR 3211(a)(8) for lack of personal jurisdiction. Plaintiff opposes.

I. THE COMPLAINT

As pertinent here, plaintiff alleges in its complaint that Patel, along with her husband, defendant Jain, are the principals and officers of defendant Spire Management Group, Inc.

Plaintiff asserts a claim of fraud against all defendants, alleging as follows:

- (1) Between March 2014 and August 2015, Patel and Jain, who own, operate, and control Spire, solicited and accepted advances from plaintiff totaling \$400,000;
- (2) In order to induce plaintiff to make the advances, Patel and Jain false represented to plaintiff's principal, Ramit Arora, "that the business was in good financial shape because defendant Patel stood behind it and would fund any shortfalls";

- (3) Plaintiff relied upon financial documents it received from defendants to determine whether to make the advances;
- (4) Before each advance, defendants assured plaintiff that Patel, "aside from being a medical doctor was the vice president and secretary of Spire Management and shared all responsibilities for its operation jointly" with Jain;
- (5) Plaintiff relied on defendants' representations and financial documents in deciding to advance funds;
- (6) The representations made by defendants were false as Patel's "role had been exaggerated," and were designed to induce plaintiff to advance funds;
- (7) Defendants prepared fraudulent documents to mislead plaintiff as to Spire's financial viability, the reason for the advances, and Patel's role;
- (8) Defendants intended to deceive plaintiff knowing that plaintiff would reasonably rely on the representations and documents; and
- (9) But for the false representations, plaintiff would not have advanced funds to defendants.

Plaintiff also contends that Spire defaulted on its agreements with plaintiff, causing plaintiff damages in excess of \$350,000, and that defendants knew that Spire was struggling financially and purposely withheld the fact that Patel's role with Spire was minimal. It thus seeks compensatory damages, attorney fees, and punitive damages. (NYSCEF 1).

On June 4, 2015, Jain signed a confession of judgment, permitting plaintiff to enter judgment against him in the amount of \$139,000, less any payments made to plaintiff pursuant to a future receivables sale agreement dated June 4, 2015. The confession arose from Jain's failure to repay plaintiff under the June 2015 agreement. (NYSCEF 17).

Arora, by affidavit dated June 6, 2016, asserts that Patel contacted him in New York "multiple times" and "on many occasions" between 2014 and 2015 by telephone, text, e-mail, and regular mail to convince him to make advances to Spire, telling him that Spire was

financially sound and that she was directly involved in its operation, knowing that Spire was a failing business. (NYSCEF 14). Arora submits documents purporting to evidence Patel's connection to Spire, to wit, Spire's Articles of Incorporation for Georgia Profit Corporation, dated March 7, 2011, which reflects that Patel is Spire's registered agent (NYSCEF 15), a stock certificate, signed March 31, 2011, which reflects that Patel is Spire's secretary (NYSCEF 16), and a future receivables sale agreement between plaintiff and Spire, dated August 19, 2015, which contains a personal guaranty and bears Patel's initials and signature, identifying her as Spire's vice-president. The sale agreement was notarized on August 19, 2015 in Arizona by notary public Tara Wainwright; neither Arora nor plaintiff signed it. (NYSCEF 17).

By affidavit dated July 5, 2016, Patel contends that she divorced Jain in June 2016, and that Spire is wholly owned and operated by him. She denies having ever been involved with Spire in any capacity, having served or agreed to serve as its principal, officer, or agent, having seen or signed Spire's articles of incorporation, the 2011 stock certificate, or the sale agreement, and having signed the sale agreement before Wainwright or any notary. Rather, she contends that at all relevant times she was engaged full-time in the practice of medicine in Arizona. Patel also asserts that between 2014 and 2015, she never heard of plaintiff, never interacted with any of its officers or employees, and never communicated with Arora, and that the first time she spoke to him was when he contacted her in February 2016 about defendants' alleged fraud. (NYSCEF 35). In support, Patel submits Spire's Corporation Annual Registration statements filed with the Georgia Secretary of State from 2013 to 2015, all of which reflect that Jain is the only officer of Spire, and its secretary and agent. (NYSCEF 32-34).

Wainwright, in an affidavit dated July 5, 2016, states that she is a notary public in Arizona, and that her notary records reflect that she performed no notarial acts for Patel in August 2015, but that she notarized Jain's signature on a business agreement in August 2015. (NYSCEF 36).

II. CONTENTIONS

Patel argues that plaintiff does not plead with particularity its claim of fraud against her absent allegations against her individually or a particularized description of the alleged misrepresentations or its alleged reliance on the misrepresentations, and that any promise made by her to guarantee Spire's debts personally is barred by the statute of frauds. She contends that the court lacks personal jurisdiction over her as she never had contact with plaintiff, and that even if she did, the exchange of information through phone, email, mail, or text is insufficient to subject her to the court's long-arm jurisdiction. She also maintains that punitive damages are unavailable on a claim of fraud. (NYSCEF 3).

Plaintiff asserts that the fraud claim is sufficiently pleaded, and that its allegations against Patel suffice to establish personal jurisdiction over her as she contacted it in New York and the tortious injury occurred here.

In reply, Patel reiterates her arguments. (NYSCEF 30).

III. ANALYSIS

Jurisdiction is a threshold issue that must be determined before any other defenses asserted in a motion to dismiss. (*Howard v Spitalnik*, 68 AD2d 803 [1st Dept 1979]). Pursuant to CPLR 3211(a)(8), a cause of action may be dismissed on the ground that the court lacks personal jurisdiction over the defendant. Pursuant to CPLR 302(a), the court may exercise personal

jurisdiction over a non-domiciliary of New York, who in person or through an agent, as pertinent here, commits a tortious act within the state, or commits a tortious act without the state causing injury to person or property within the state, if the defendant expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

If jurisdiction is challenged, the plaintiff bears the burden of establishing jurisdiction over the defendant (*Arroyo v Mountain School*, 68 AD3d 603 [1st Dept 2009]), and must come forward with sufficient evidence, through affidavits and relevant documents, to prove the existence of jurisdiction (*Coast to Coast Energy, Inc. v Gasarch*, 2017 WL 367482, 2017 NY Slip Op 00532 [1st Dept]). Plaintiff need not demonstrate, *prima facie*, jurisdiction but only a “sufficient start” showing that its position is not frivolous. (*Peterson v Spartan Indus., Inc.*, 33 NY2d 463 [1974]).

An evidentiary hearing may be required if there are material conflicts between the parties’ affidavits. (*See Stardust Dance Prods., Ltd. v Cruise Groups Intern., Inc.*, 63 AD3d 1262 [3d Dept 2009] [issue of jurisdiction should not be decided on basis of conflicting affidavits]). Discovery limited to the issue of jurisdiction may also be directed. (*Peterson*, 33 NY2d at 463).

Having denied in her affidavit that she ever spoke to or communicated with plaintiff or Arora between 2014 and 2015, when the alleged fraud allegedly occurred, she thereby denies the basis on which plaintiff alleges jurisdiction and disputes Arora’s claims that he communicated with her often between 2014 and 2015. The parties’ affidavits are thus entirely conflicting.

Moreover, it is plaintiff’s burden to establish jurisdiction through affidavits and documentary evidence (*Coast to Coast Energy, Inc.*, 2017 WL 367482, 2017 NY Slip Op 00532;

cf. Cotia [USA] Ltd. v Lynn Steel Corp., 134 AD3d 483 [1st Dept 2015] [plaintiff offered only conclusory allegations to support long-arm jurisdiction]; *SunLight Gen. Cap. LLC v CJS Investments Inc.*, 114 AD3d 521 [1st Dept 2014] [plaintiff failed to submit tangible evidence to demonstrate long-arm jurisdiction]), and although Arora states that he has copies of e-mails and financial documents tying Patel to the alleged fraud, he asserts only that he will submit the documentation “at the appropriate time.” (NYSCEF 14).

In *Am. BankNote Corp. v Daniele*, the Court found that the plaintiff’s pleadings, affidavits, and accompanying documents made a “sufficient start” to warrant further discovery on the issue of personal jurisdiction. However, the defendants’ denial of the plaintiff’s jurisdictional allegations required the trial court to hold the motion to dismiss in abeyance pending a hearing on the jurisdictional issue. (45 AD3d 338 [1st Dept 2007]).

Therefore, in light of the parties’ conflicting affidavits, the fact that plaintiff submits no evidence of Patel’s alleged communications or actions, and as the allegations regarding Patel in plaintiff’s complaint and Arora’s affidavit are vague and conclusory, a hearing is ordered. (*See Stardust Dance Prods., Ltd.*, 63 AD3d at 1265 [when faced with conflicting affidavits, court should have held hearing to determine nature and extent of defendants’ activities before making decision on jurisdictional defense]; *Shea v Hambro Am. Inc.*, 200 AD2d 371 [1st Dept 1994] [court did not err in ordering reference on issue of lack of jurisdiction as “sharply conflicting affidavits” required hearing]; *Krupnick v Danin*, 86 AD2d 623 [2d Dept 1982] [as parties submitted opposing affidavits as to basis of jurisdiction, court should not have determined issue on affidavits, as testimony from witnesses was required]; *Cato Show Printing Co., Inc. v Lee*, 84 AD2d 947 [4th Dept 1981], *app dismissed* 56 NY593 [1982] [hearing necessary where affidavits

present conflicting facts on significant New York contacts]; *see also Peterson*, 33 NY2d at 467 [court properly directed hearing before referee on issue of personal jurisdiction, holding motion to dismiss in abeyance, and permitted discovery and inspection within hearing]; *Coudert Bros. v Malmrose*, 268 AD2d 261 [1st Dept 2000] [court properly dismissed complaint against defendant based on plaintiff's failure to establish at hearing that defendant had transacted business or committed tort within New York]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Patel's motion to dismiss is held in abeyance, pending a hearing on the issue of whether this court may exercise personal jurisdiction over her; it is further

ORDERED, that a Special Referee shall be designated to hear and report to this court on the following individual issue of fact, which is hereby submitted to the Special Referee for such purpose: whether there is a basis for asserting jurisdiction over defendant Patel pursuant to CPLR 302(a)(2) and/or (3); it is further

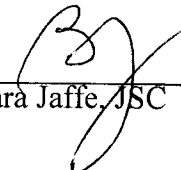
ORDERED, that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon which the calender of the Special Referee Part (Part SRP), which, in accordance with the Rules of that Part, shall assign this matter to an available Special Referee to hear and report as specified above; it is further

ORDERED, that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of this order, submit to the Special Referee Clerk by fax (212-401-9186) or email, an information sheet (which can be accessed at the "References" link on the

court's website) containing all the information called for therein and that, as soon as practicable thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calender of the Special Referee Part; 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, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee Part in accordance with the Rules of that Part.

ENTER:



Barbara Jaffe, JSC

DATED: January 30, 2017
New York, New York