

Zoni Language Centers, Inc. v Glassdoor Inc.

2017 NY Slip Op 30199(U)

January 30, 2017

Supreme Court, New York County

Docket Number: 158400/2016

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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ZONI LANGUAGE CENTERS, INC., ZOLIO NIETO

Petitioners,

DECISION & ORDER
Index No. 158400/2016

-against-

Mot. Seq. 001

GLASSDOOR INC.,

Respondent.

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Petitioners' petition for pretrial disclosure is denied and this proceeding is dismissed because this Court does not have jurisdiction over respondent.

Background

This action arises out of anonymous comments made on respondents' website regarding petitioners' English as a Second Language schools in New York. Petitioners claim that they want information necessary to obtain the identities of 14 anonymous reviewers, who posted allegedly defamatory comments about petitioners' language school. Petitioners seek the reviewers names, addresses, telephone numbers, email addressees, user names, IP addresses, server log entries, payment methods, credit card information, billing records, and ISPs associated with the reviewers.

Petitioners claim that New York has jurisdiction over respondent, a Delaware Corporation with its principal place of business in Mill Valley, California, because respondent conducts purposeful activity in New York.

Petitioners also assert that their claims are meritorious, including petitioners' claims for commercial defamation, disparagement, false advertising and defamation. Petitioners also insist that their competitors are behind these negative reviews, which characterize the language school as unethical, dishonest and an incompetent school.

In opposition, respondent claims that the terms of use that petitioner Zoni and petitioner Nieto agreed to when setting up their Glassdoor account requires that discovery seeking a user's information must be brought in state courts in Marin County, California or in the Northern District of California. Respondent further insists that petitioners have not made a prima facie case for defamation because the allegedly defamatory statements were merely opinions. Respondent insists that no reasonable reader could construe any of the 14 reviews as containing objective facts.

Respondent also claims that the statute of limitations has expired with respect to six of the reviewers because reviews 9-14 were posted more than one year before petitioners brought the instant action (on October 6, 2016).

Respondent also insists that this Court lacks jurisdiction over it. Respondent argues that its website does not allow users to conduct any commerce. Respondent argues that there is no specific jurisdiction pursuant to New York's long-arm statute (CPLR 302[a][1]).

Discussion

As an initial matter, the Court observes that the terms and conditions issue – whether petitioners are required to litigate a pre-suit discovery proceeding in California pursuant to section 13 of the new terms and conditions – is not applicable here because the new terms and conditions did not become effective until after this proceeding started. Respondent's exhibit J (to the O'Brien affidavit) contains an email dated September 13, 2016 describing the new section for employers regarding legal discovery and stating that the terms of use become effective 30 days after the date the notice of the revision is emailed. This means the terms became effective on October 13, 2016, 30 days after the September 13 email and after petitioners initiated the instant proceeding (on October 6, 2016).

The prior terms of use (O'Brien affirmation exh K) do not contain a forum selection clause for pre-suit discovery matters. Petitioners' purported use of the account after this litigation occurred (on November 1, 2016) does not change the Court's conclusion. Otherwise, respondent could change its forum selection clause throughout a litigation and force petitioners to start proceedings in multiple jurisdictions.

Personal Jurisdiction

Next, the Court will address jurisdiction because that is a threshold issue. There is no basis for general jurisdiction pursuant to CPLR 301 because respondent is not incorporated in New York and its principal place of business is not in New York (*Magdalena v Lins*, 123 AD3d 600, 601, 999 NYS2d 44 [1st Dept 2014] citing *Daimler AG v Bauman*, 571 US –, 134 SCt 746, 760 [2014]).

The Court must then consider whether there is jurisdiction over respondent pursuant to CPLR 302(a)(1), New York's long-arm statute. CPLR 302(a) provides that "a court may exercise personal jurisdiction over any non-domiciliary . . . who in person, or through an agent: (1) transacts any business within the state or contracts anywhere to supply goods or services in the state . . ."

"Whether a non-domiciliary is transacting business within the meaning of CPLR 302(a)(1) is a fact based determination and requires a finding that the non-domiciliary's activities were purposeful and established a substantial relationship between the transaction and the claim asserted. Purposeful activities are volitional acts by which the non-domiciliary avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws" (*Paterno v Laser Spine Inst.*, 24 NY3d 370, 376, 998 NYS2d 720 [2014] [internal quotations and citations omitted]). "More than limited contacts are required for purposeful activities sufficient to establish that the non-domiciliary transacted business in New York . . . [A] non-domiciliary transacts business when on his or her own initiative the non-domiciliary projects himself or herself into this state to engage in a sustained and substantial transaction of business" (*id.* at 376-77).

The long-arm statute has limited application in defamation cases in order to avoid inhibiting freedom of speech of the press (*Legros v Irving*, 38 AD2d 53, 55, 327 NYS2d 317 [1st Dept 1971]).

Therefore, this Court must consider whether the long-arm statute applies to respondent, who did not make, edit, or generate revenue directly from these allegedly defamatory reviews. Respondent claims that it merely "provides a forum for current and former employees of

businesses to anonymously voice their opinions regarding [their] companies” (O’Brien affirmation, ¶ 2). Petitioners’ argument is that Glassdoor is an interactive website and, therefore, there is personal jurisdiction over respondent.

“While no New York appellate court has yet explicitly analyzed a case of website defamation under the transacting business provision of section 302(a)(1), several federal district courts in New York have . . . concluded that the posting of defamatory material on a website accessible in New York does not without more, constitute transacting business in New York for the purposes of New York’s long-arm statute” (*Best Van Lines, Inc. v Walker*, 490 F3d 239, 250 [2d Cir 2007]).

“In analyzing personal jurisdiction in the internet context, many New York courts have adopted the sliding scale of interactivity . . . according to which websites are classified as (1) interactive [a defendant provides goods and services over the internet or knowingly and repeatedly transmits computer files to customers in other states]; (2) middle ground [permits the exchange of information between users in another state and the defendant], and (3) passive [makes information available to users]. Thus, it has been held that exercising personal jurisdiction over the owner of an internet website accessible in New York, required that the site be “highly interactive” and more than mere presence on the internet. On the other hand, web sites . . . where a user can exchange information with the host computer, occupy a middle ground, and the exercise of jurisdiction in these cases is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site. Where website falls somewhere in the “middle ground,” the jurisdictional inquiry requires closer evaluation of its contact with New York residents.”

Deer Consumer Products, Inc. v Little, 35 Misc 3d 374, 385, 938 NYS2d 767 [Sup Ct, NY County 2012] [internal quotations and citation omitted].

The closest case on point appears to be *Hall v Lipstickalley*, (2011 NY SlipOp 33764(U), [Sup Ct, NY County 2011]), in which Justice Rakower dismissed petitioners’ petition for the identities of anonymous posters who allegedly posted defamatory statements against petitioners

on the ground that the Court lacked personal jurisdiction over respondent. Justice Rakower found that the website, “Lipstickalley,” was owned by Verve, a Michigan corporation with its principal place of business in Pontiac, Michigan (*id.* at *1). Justice Rakower considered the website’s interactivity and found that “Lipstick Alley is merely a passive website which allows users to comment on and discuss various issues with other users” (*id.* at *3).

In the instant proceeding, the Court finds that Respondent’s website is not an interactive website because the website does not transmit goods or services to consumers in New York. It merely provides a place for them to discuss employers. The Court also finds that respondent’s website is not truly passive, because it “allows, indeed invites, a level of interactivity that extends well beyond merely making information available to visitors” (*Royal Network Inc. v Dishant.com, LLC*, 638 FSupp2d 410, 419 [SD NY 2009]). The essence of respondent’s website is to encourage posters to write reviews of employers.

Instead, this Court considers this website a middle ground and must conduct a closer evaluation of its contact with New York residents. Although the website invites New York employers and users to use the site to learn about companies in New York, respondent does not participate in the content of these reviews. The exchange of information is only between users rather than with respondent. Therefore, although this website is somewhat more interactive than the website in *Lipstickalley*, respondent’s website does not constitute transacting business for purposes of New York’s long-arm statute and this Court cannot exercise personal jurisdiction over respondent.

Otherwise, respondent would be subject to personal jurisdiction simply for operating a website in which users can access and post information and opinions about employers in New

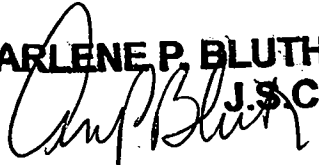
York. The definition of ‘transacting business’ would be extended beyond recognition if it were to apply to respondent in the instant proceeding because the creation of an account for both a user and an employer is free (*see* O’Brien affirmation, exhs C, D). Although there is a fee for posting a job on Glassdoor (*id.* exh D), that appears to be a separate additional feature apart from the free accounts and reviews at issue in this proceeding. There is no evidence that an employer or a user is required to spend any money in order to access reviews or information about companies.

Accordingly, it is hereby

ORDERED that the petition is denied and the proceeding is dismissed.

This is the Decision and Order of the Court.

Dated: January 30, 2017
New York, New York

ARLENE P. BLUTH
J.S.C.


ARLENE P. BLUTH, JSC