SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: HON. ELLEN M. COIN **PART 63**

JASON R. MISCHEL,

Plaintiff,

-against-

SAFE HAVEN ENTERPRISES, LLC, ALTA BAKER and JOHN BAKER,

Defendants.

INDEX NO. 653651/2016
MOTION DATE Jan. 11, 2017
MOTION SEQ. NO. 001
E-FILED

The following papers, numbered 1, were read on this motion to dismiss:

Papers	Papers Numbered
Notice of Motion-Affidavits-Exhibits	1
Answering Affidavits-Exhibits	2
Reply Affidavits	3

Cross-Motion X No

In this action plaintiff, an attorney, seeks compensation for work, labor and services allegedly performed on behalf of defendant Safe Haven Enterprises, LLC (Safe Haven) and separately on behalf of each of the individual defendants. Defendants move to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action and pursuant to CPLR 3211(a)(8) on the ground of lack of jurisdiction.

Simultaneously with defendants' filing of the instant motion to dismiss the complaint, plaintiff filed his amended complaint as of right. In reply, defendants addressed the amended complaint. Accordingly, the motion is applied to the amended complaint (*Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35, 36

[1st Dept 1998]).

Although the ultimate burden of proof regarding personal jurisdiction rests with the plaintiff (*O'Brien v Hackensack Univ. Med. Ctr.*, 305 AD2d 199 [1st Dept 2003]), to defeat a CPLR 3211(a)(8) motion to dismiss a complaint, the plaintiff need only make a prima facie showing that the defendant is subject to the personal jurisdiction of the court. (*Shatara v Ephraim*, 137 AD3d 1244, 1246 [2nd Dept 2016]).

Jurisdiction by Consent

While Safe Haven alleges that it is not subject to this court's jurisdiction, plaintiff shows that Safe Haven, a foreign limited liability company, registered to do business in New York on or about November 1, 2013 (Bellovin Aff., ex. B).

Prior to the Supreme Court ruling in *Daimler AG v Bauman* (134 S Ct 746 [2014]), the courts of this state held that a foreign corporation is deemed to have consented to personal jurisdiction over it when it registers to do business in New York and appoints the Secretary of State to receive process for it pursuant to Business Corporation Law §§ 304 and 1304 (*Bagdon v Philadelphia & Reading Coal & Iron Co.*, 217 NY 432, 436-37 [1916]; *Doubet LLC v Trustees of Columbia Univ. in the City of N.Y.*, 99 AD3d 433 [1st Dept 2012]; *Muollo v Crestwood Village, Inc.*, 155 AD2d 420 [2nd Dept 1989]; *Augsbury Corp. v Petrokey Corp.*, 97 AD2d 173 [3d Dept 1983]).

In *Daimler* the Supreme Court determined that the test for general jurisdiction over a corporation is whether the corporation's affiliations with the State are so continuous and systematic as to render it essentially at home in the forum. The Supreme Court instructed that a corporation is essentially at home where it is incorporated or where it has its principal place of business. 134 S Ct at 760. The instant complaint does not allege that Safe Haven meets either of these criteria. Thus, this court must determine whether by registering to do business in New York, Safe Haven became subject to this court's jurisdiction in accordance with due process.

In *Brown v Lockheed Martin Corp.* (814 F3d 619 [2016]), the Second Circuit Court of Appeals analyzed the Connecticut registration statute for foreign corporations to determine whether it purported to confer on that state's courts the power to exercise general jurisdiction over duly registered foreign corporations. The Court determined that the statute did not contain express language alerting the potential registrant that by complying with the statute and appointing an agent for receipt of process, it would be agreeing to submit to the general jurisdiction of the state courts. 814 F3d at 636. The *Brown* court held that federal due process, as enunciated in *Daimler*, constrains an interpretation that "transforms a run-of-the-mill registration and appointment statute into a corporate

'consent'-perhaps unwitting-to the exercise of general jurisdiction by state courts, particularly in circumstances where the state's interests seem limited." 814 F3d at 637.

After *Daimler* federal district courts considering the issue of whether general jurisdiction can be predicated solely on the basis of a foreign corporation's having registered to do business in New York determined that the mere fact of such registration is insufficient to confer general jurisdiction here (*Famular v Whirlpool Corp.*, 2017 WL 280821 [SD NY 2017]; *Minholz v Lockheed Martin Corp.*, 2016 WL 7496129 [ND NY 2016]; *Taormina v Thrifty Car Rental*, 2016 WL 7392214, *6 [SD NY 2016]; *Bonkowski v HP Hood LLC*, 2016 WL 4536868 [ED NY 2016]; *Chatwal Hotels & Resorts LLC v Dollywood Co.*, 90 F Supp3d 97, 105 [SD NY 2015]).

Two New York courts considering this issue which found consent by registration (*Corporate Jet Support, Inc. v Lobosco Ins. Group, L.L.C.* 2015 WL 5883026 [Sup Ct, New York County 2015]; *Bailen v Air & Liquid Sys. Corp.*, 2014 WL 3885949 [Sup Ct, New York County 2014]) relied on dicta in *Beach v Citigroup Alternative Investments LLC* (2014 WL 904650 [SD NY 2014]). However, in *Beach* there was no allegation of registration, and the court merely cited pre-*Daimler* cases for the general proposition that a corporation may consent to jurisdiction in New York by registering to do business here (2014 WL 904650, *6).

In *Serov v Kerzner Intl. Resorts, Inc.* (52 Misc3d 1214[A][Sup Ct, New York County 2016]), the court, relying on pre-*Daimler* case law, found consent to jurisdiction by the defendant's having registered to do business in New York. While discussing *Daimler* generally, the *Serov* court "did not discuss the impact of *Daimler* on the viability of predicating general jurisdiction on consent through the business-registration statutes" (*Taormina v Thrifty Car Rental* , 2016 WL 7392214, *6 [SD NY 2016]).

All 50 states require registration of foreign corporations to do business (Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 Cardozo L Rev 1343 [2015]). If, after *Daimler*, these statutes were deemed to meet due process standards, foreign corporations seeking to avoid general jurisdiction in a state would be faced with unenviable choices: (1) not doing business in the state; (2) registering and subjecting themselves to general jurisdiction; or (3) doing business in the state without registration and thereby breaking the law (*id.*). As Monestier suggests, the net effect of finding jurisdiction by registration would be coercive.

Then there is the problem of notice. The New York registration statute (BCL § 304), while designating the secretary of state as the registrant's agent for service of process, is silent on the jurisdictional effect of registering to do business

here. In apparent recognition of this omission, a bill was introduced in the State Assembly to make plain that registration constituted consent to the general jurisdiction of the courts of this state (2014 NY Assembly Bill S7078). The proposed statute was not enacted.

Here, defendant Safe Haven is a foreign limited liability company. Limited Liability Company Law § 301(a) provides that the secretary of state "shall be the agent of...every foreign limited liability company upon which process may be served pursuant to this chapter." Subsection (b) provides, "No...foreign limited liability company may be formed or authorized to do business in this state under this chapter unless its articles of organization or application for authority designates the secretary of state as such agent." The registration provisions of the Limited Liability Company Law (§ 301) precisely track the language of BCL § 304(a) and (b) designating the secretary of state as the agent for service of process for foreign corporations authorized to do business in this state. As is the case with the provisions of the BCL, the Limited Liability Company Law gives no notice to the registrant that registration confers consent to the general jurisdiction of the New York courts. Thus, interpreting this statute as providing such consent is inconsistent with due process standards.

Plaintiff notes that on March 15, 2016, prior to the time that service was effected on Safe Haven by service on the Secretary of State, Safe Haven surrendered its certificate of authority to do business here (Bellovin Aff., ex. B). Plaintiff cites Business Corporation Law § 1310, regarding a foreign corporation's surrender of authority, as a basis for this court's jurisdiction. Since Safe Haven is a foreign limited liability company, the statute is plainly inapposite. However, even the applicable statute, Limited Liability Company Law § 806(a), does not aid plaintiff. It continues the authority of the secretary of state, upon surrender of authorization to do business, " to accept service of process **with respect to causes of action arising out of doing business in this state**" (emphasis added). As shown below, plaintiff fails to meet this statute's "doing business" criterion.

Doing Business Pursuant to CPLR § 301

Plaintiff alleges that Safe Haven has solicited business in New York, subjecting it to general jurisdiction under CPLR § 301. He offers evidence that Safe Haven became listed as a vendor on the Port Authority of New York and New Jersey on-line directory of certain women-owned business enterprises; that Safe Haven entered into discussions with the New York State Office of Goods and Services to supply a control booth and detention windows; and sought business from the New York Metropolitan Transportation

Authority (Bellovin Aff., exs. E-G).

A foreign entity is amenable to suit in the New York courts if it is engaged in such a systematic and continuous course of doing business here as to warrant a finding of its presence in this jurisdiction. (*Frummer v Hilton Hotels Intl.*, 19 NY2d 533, 536 [1968][citations and internal quotation marks omitted]). Thus, mere solicitation of business for an out-of-state concern is not enough to constitute doing business. (*Id.*). Plaintiff's examples of Safe Haven's solicitations are insufficient to demonstrate the systematic and continuous course of doing business required to subject Safe Haven to the jurisdiction of this court pursuant to CPLR § 301.

Impact of *Fischbarg v Doucet*

Under CPLR 302(a)(1), a court may exercise personal jurisdiction over any non-domiciliary who transacts any business within the state. Such jurisdiction is proper "even though the defendant never enters New York, so long as the defendant's activities here 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][citation omitted]). Whether a non-domiciliary has engaged in sufficient purposeful activity to confer jurisdiction in New York requires an examination of the quality of the defendants' New York contacts (*Fischbarg v Doucet*, 9 NY3d 375,

380 [2007]). Case law emphasizes the need for "the purposeful creation of a continuing relationship with a New York [person]" (*George Reiner & Co. v Schwartz*, 41 NY2d 648, 6540 [1977]).

More than limited contacts are required for purposeful activities sufficient to establish that non-domiciliaries transacted business in New York (*Coast to Coast Energy, Inc. v Gasarch*, 146 AD3d 654 [1st Dept 2017]).

Here, the amended complaint alleges that plaintiff, Safe Haven's Executive Vice President of Business Development and General Counsel, represented Safe Haven and the individual defendants in various litigations and other matters. However, while plaintiff cites *Fischbarg*, he fails to allege that the defendants engaged in regular communications with him in this state, comparable to those alleged in *Fischbarg* and sufficient to invoke this court's jurisdiction. All that plaintiff alleges are his own activities on behalf of the defendants.

Accordingly, plaintiff fails to make a prima facie showing that the defendants are subject to the jurisdiction of this court. The motion to dismiss the complaint as against the defendants for lack of jurisdiction is granted.

In light of my dismissal of the complaint pursuant to CPLR 3211(a)(8), I need not consider so much of their motion as seeks dismissal under CPLR 3211(a)(7).

This constitutes the decision and order of the Court.

Dated: April 17, 2017

Ellen M. Coin, A.J.S.C.

Case Disposed