Pope Invs. LLC v PacificNet Games Ltd.
2017 NY Slip Op 30795(U)
April 19, 2017
Supreme Court, New York County
Docket Number: 650379/2009
Judge: Marcy Friedman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

POPE INVESTMENTS LLC,

Plaintiff,

– against –

Index No.: 650379/2009

PACIFICNET GAMES LIMITED, PACIFICNET, INC., SINO MART MANAGEMENT LIMITED, VICTOR TONG, TONY TONG, TAO JIN, JEREMY GOODWIN, GUO JING SU, MIKE FEI, SHAOJIAN WANG, PHILLIP WONG, and JOHN DOE(S) 1-20,

Defendants.

DECISION/ORDER

This action arises out of nonpayment of a loan made by plaintiff Pope Investments LLC (Pope) to defendant PacificNet Games Limited (PacNet Games), and guaranteed in part by defendant PacificNet, Inc. (PacNet). Defendant Tony Tong, the former Chief Executive Officer and member of the board of directors of PacNet, moves to vacate a default judgment entered against him and to dismiss the action.

BACKGROUND

Pope is a limited liability company incorporated in Delaware, with its principal place of business in Tennessee. (Compl. ¶ 5; Pl.'s Memo. In Opp. at 3.) PacNet Games is a company incorporated in the British Virgin Islands, with a principal place of business in Hong Kong. (Compl. ¶ 6.) Pope and PacNet Games executed a Convertible Secured Promissory Note (Note) and a Loan Agreement, each dated February __, 2007, under which Pope agreed to lend $5,000,000 to PacNet Games (the Loan). (Compl. ¶¶ 20-21; Note [NYSCEF Doc. No. 50-2];

Loan Agreement [NYSCEF Doc. No. 50-1].) Prior to its dissolution in 2012, PacNet was a Delaware corporation with a principal place of business in Beijing, China and was the parent corporation of PacNet Games. (Compl. ¶ 7; Lakhany Aff. in Support [Lakhany Aff.] ¶ 6.) PacNet and Pope entered into a Stock Pledge and Guaranty Agreement (Pledge Agreement), dated February __, 2007, by which PacNet guaranteed up to $2,000,000.00 of the amounts outstanding under the Note.[1] (Compl. ¶ 23; Pledge Agreement § 2 [a] [NYSCEF Doc. No. 50-4].) PacNet secured its guaranty with a pledge of all of its shares of PacNet Games, which constituted 51 percent of all of PacNet Games' outstanding shares (Pledged Collateral). (Compl. ¶ 23; Pledge Agreement, Whereas Clause, § 1.) The Note was executed by Victor Tong as CEO of PacNet Games. The Pledge Agreement was signed by Victor Tong as President of PacNet.

As set forth in the affirmation of Tony Tong,[2] and not disputed by Pope, Tony is a citizen of the United States and resident of Hong Kong. (Tong Aff. in Support [Tong Aff.] ¶ 4.) Tony affirms that he has been living and working in Hong Kong since 2001. (Id.) Tony served as CEO of PacNet until September 4, 2008 and continued to serve as a member of the board of directors and consultant to PacNet until 2009 when PacNet ceased operations. (Id. ¶ 6.) Tony also served as chairman of the board of the directors of PacNet between 2002 and 2008. (Id. ¶ 7.)

Pope alleges that once PacNet Games received the loan proceeds, Victor Tong engaged in a scheme with the other defendants to divert the proceeds from Pope to "other entities in which

[1] By Guaranty dated January __, 2007, defendants Sino Mart Management Ltd. and Victor Tong also guaranteed up to 3,000,000.00 of amounts outstanding under the Note. (Compl. ¶ 22.)

[2] Tony and Victor Tong are brothers and are both defendants in this action. They will sometimes be referred to by their first names, not out of disrespect but in order to avoid confusion. Tony and Victor are collectively referred to as the Tong Brothers.

Victor Tong had an interest. . . ," and that "[t]his misappropriation of funds caused PacNetGames to default and caused a substantial impairment of the value of the Pledged Collateral." (Compl. ¶ 2.) Pope further alleges that the misappropriation included money advanced to Tony in the sum of $100,000. (Id. ¶ 30.) In the fifth cause of action, Pope asserts, without further factual detail, that PacNet, Victor Tong, Tony Tong, and others "engaged in a scheme to transfer funds invested by Pope in PacNetGames to other entities controlled by PacNet or the Tong brothers, in violation of the Note and Loan Agreement." (Id. ¶ 58; see also id. ¶ 64 [similar allegation in support of sixth cause of action].)

By letters dated May 15, September 17, and October 1, 2008, Pope gave notice of default to PacNet Games, and accelerated the balance due on the Note pursuant to the terms of the Loan Agreement. (Id. ¶¶ 32, 34-35; Loan Agreement, § 7.2.) By letter dated October 21, 2008, Pope gave notice of default to PacNet and to Loeb & Loeb LLP, which is PacNet's counsel and escrow agent in New York in physical possession of the shares of PacNet Games pledged by PacNet as collateral for its guaranty.[3] (Compl. ¶ 39.)

Pope filed the summons and complaint on June 26, 2009. In the complaint, Pope asserts three causes of action that specifically name Tony: impairment of collateral (fifth cause of action), fraudulent conveyance (sixth cause of action), and breach of fiduciary duty (seventh cause of action, mislabeled as sixth cause of action).[4]

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[3] On June 9, 2016, the court ordered limited discovery and directed Tony to produce the escrow agreement entered into between PacNet and Loeb & Loeb. (June 9, 2016 Transcript at 24.) By letter dated August 22, 2016, Tony's counsel informed the court that Tony was never in possession of the escrow agreement and has no way to obtain it. (NYSCEF Doc. No. 225.) Tony's counsel, with Pope's consent, submitted an email showing that Loeb & Loeb has conducted a search of its records and has been unable to locate the escrow agreement, but is in possession of stock certificates for PacNet Games. (Id.)

[4] The complaint also alleges a cause of action for an accounting, which Pope contends is also applicable to Tony. (See Pl.'s Supplemental Memo. In Supp. at 2.)

By order dated June 9, 2010 (NYSCEF Doc. No. 57), this court (Fried, J.) granted a default judgment in favor of Pope Investments LLC and against defendants PacNet Games, PacNet, Sino Mart Management Limited (Sino), Victor Tong, and Tony Tong in the amount of $5,903,288.00 plus interest. By the same order, the court referred the assessment of reasonable attorney's fees to a Special Referee. By order dated September 8, 2010 (NYSCEF Doc. No. 70), the court (Fried, J.) confirmed the Special Referee's Report. On October 20, 2010, the Clerk entered a judgment in Pope's favor and against defendants PacNet Games, PacNet, Victor Tong, and Tony Tong in the sum of $3,349,177.92, and a second judgment in Pope's favor and against defendants PacNet Games, PacNet, Victor Tong, Tony Tong, and Sino in the amount of $3,980,510.75.

By decision and order dated December 11, 2013, this court denied Victor Tong's motion to vacate the judgment, holding that the court had personal jurisdiction over him and that he lacked a reasonable excuse for his default and potentially meritorious defenses to the action. (Pope Invs., LLC v. PacificNet Games Ltd., 2013 NY Slip Op 33136[U], 2013 WL 6515754 [Sup Ct, NY County 2013].)

Tony Tong now moves to vacate the default judgment in this action, pursuant to CPLR 5015 (a) (1) and (4), CPLR 317, and CPLR 3211 (a) (8), on the grounds that this court lacks personal jurisdiction over him and that service was not properly made. In the alternative, Tony contends that he has an excuse for his default and meritorious defenses to this action. By separate motion, plaintiffs seek to strike hearsay assertions, regarding Pope's attempted service of papers, from the affirmation submitted by Tony in support of his motion to vacate the default judgment.

PERSONAL JURISDICTION

It is well settled that the ultimate burden rests with the plaintiff, as the party asserting jurisdiction, "to present sufficient facts to demonstrate jurisdiction." (Cotia (USA) Ltd. v Lynn Steel Corp., 134 AD3d 483, 484 [1st Dept 2015]; Copp v Ramirez, 62 AD3d 23, 28 [1st Dept 2009], lv denied 12 NY3d 711.) A plaintiff opposing a motion to dismiss for lack of personal jurisdiction is not, however, required to make "[a] prima facie showing of jurisdiction." (Peterson v Spartan Indus., Inc., 33 NY2d 463, 467 [1974].) Rather, in order to be entitled to jurisdictional discovery, the plaintiff need only make a "sufficient start" showing its position "not to be frivolous." (Id.; see also Venegas v Capric Clinic, 147 AD3d 457, 458 [1st Dept 2017]; HBK Master Fund L.P. v Troika Dialog USA, Inc., 85 AD3d 665, 666 [1st Dept 2011].) To meet this burden, the plaintiff must "come forward with tangible evidence sufficing to demonstrate that long-arm jurisdiction over defendants may exist." (Granat v Bochner, 268 AD2d 365, 365 [1st Dept 2000]; accord SunLight Gen. Capital LLC v CJS Invs. Inc., 114 AD3d 521, 522 [1st Dept 2014].) If a sufficient start is made, the court may "deny the motion . . . or may order a continuance to permit" discovery to take place to explore the issue. (See CPLR 3211[d].)

Pope asserts that the court has long-arm jurisdiction over Tony pursuant to CPLR 302 (a) (1), based on his transaction of business in New York, as well as CPLR 302 (a) (3), based on commission of a tortious act outside New York causing injury within New York. Pope also appears to assert that the court has general jurisdiction over Tony. (Pl.'s Memo. In Opp. at 14-

15.) For the reasons discussed below, the court concludes that Pope fails to make a sufficient start warranting jurisdictional discovery and that the court lacks jurisdiction over Tony.

Long-Arm Jurisdiction Under CPLR 302 (a) (1) and (3)

In moving to dismiss for lack of jurisdiction, Tony contends that Pope "makes no allegation that [Tony] has substantial ties to New York . . . (e.g. that [he] does or solicits business, engages in other persistent conduct, or derives substantial revenue from goods or services within the state. . . ." (Def.'s Memo. In Supp. at 16-17.) Tony further asserts that Pope does not allege that the injury in New York was foreseeable or that Tony derives substantial revenue from interstate or international commerce. (Id. at 17.) Specifically, Tony contends that "the only connection between the causes of action against [Tony] and the state of New York is the alleged impairment of stocks (not belonging to [Tony]) held as collateral" for the Loan to PacNet Games. (Id. at 17.)

Tony submits an affirmation in which he states that in his various roles at PacNet, his duties included overseeing the daily operations in Shenzhen, China, that he "had very little interaction with PacNet, Inc.'s operations in the United States," and that Victor oversaw PacNet's U.S. operations. (Tong Aff. ¶¶ 8, 10.) Tony also submits the affidavit of Jacob Lakhany, Director of Investor Relations for PacNet between 2004 and 2008, who asserts that Tony never worked at or visited PacNet's office in the United States located in Aberdeen, South Dakota. (Lakhany Aff. ¶¶ 6, 15.)

Tony states, and Pope does not dispute, that he did not sign the Note or Pledge Agreement, and did not personally guarantee any loans from Pope to PacNet Games. (Tong Aff. ¶¶ 49, 50.)

Pope asserts that this court has personal jurisdiction over Tony under CPLR 302 (a) (1) and (3) "because the causes of action against Tony are directly related to, and arise from, his business with PacNet." (Pl.'s Memo. In Opp. at 14.) Specifically, Pope asserts four bases for jurisdiction under these statutory provisions: Tony, "as the former Chairman and CEO of PacNet, which was traded on the NASDAQ stock exchange in New York, had extensive transactional ties to New York"; "Tony's diversion of funds (or approval of diversion of funds) directly and intentionally impacted assets in New York, the NASDAQ-traded stock of [PacNet], which plummeted in price due to Tony's actions, and caused the delisting of PacNet from NASDAQ"; "Tony's actions directly and intentionally caused the devaluation of the Pledged Securities . . . held in New York by Loeb & Loeb in Manhattan"; and "Tony's actions impaired the value of the Pledged Securities under the Stock Pledge and Guaranty, which is governed by New York Law." (Id.)

Under CPLR 302 (a):

> "As to a cause of action arising from any of the acts enumerated in this section, 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; or
>
> ***
>
> 3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
>
> (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
>
> (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce."

(CPLR 302 [a] [1], [3] [i]-[ii].)

CPLR 302 (a) (1)

Under CPLR 302 (a) (1), "[the] jurisdictional inquiry is twofold: under the first prong the defendant must have conducted sufficient activities to have transacted business in the state, and under the second prong, the claims must arise from the transactions. Thus, '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.'" (Al Rushaid v Pictet & CIE, 28 NY3d 316, 323 [2016] [quoting Fischbarg v Doucet, 9 NY3d 375, 380 (2007)], rearg denied 28 NY3d 1161 [2017]; see also Kreutter v McFadden Oil Corp., 71 NY2d 460, 467 [1988] [CPLR 302 (a) (1) is "a 'single act statute' and proof of one transaction in New York is sufficient to invoke jurisdiction, 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"].)

"Purposeful activities are those with which a defendant, through volitional acts, avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." (Fischbarg, 9 NY3d at 380 [internal quotation marks and citations omitted]; accord Al Rushaid, 28 NY3d at 323; Paterno v Laser Spine Inst., 24 NY3d 370, 376 [2014].) The determination as to whether a defendant's activities were purposeful "'is an objective inquiry, [which] always requires a court to closely examine the defendant's contacts for their quality.'" (Al Rushaid, 28 NY3d at 323 [brackets in original] [quoting Licci v Lebanese Can. Bank, SAL, 20 NY3d 327, 338 (2012)].)

As a threshold matter, the court rejects Tony's assertion that Pope cannot argue that jurisdiction exists under CPLR 302 (a) (1) because Pope fails to plead this section in its complaint as a basis for jurisdiction. (See Def.'s Aff. In Reply ¶ 23.) A plaintiff is not required

to allege the basis for the court's jurisdiction. (Fischbarg, 9 NY3d at 381, n 5.) Rather, if the defendant moves to dismiss for lack of personal jurisdiction, "the plaintiff must come forward with sufficient evidence, through affidavits and relevant documents, to prove the existence of jurisdiction" (id. [internal quotation marks and citation omitted]), or to make a sufficient showing warranting jurisdictional discovery. (See supra at 5.)

In assessing the quality of Tony's contacts with New York, for purposes of jurisdiction under CPLR 302 (a) (1), the court affords plaintiff's complaint a liberal construction, as it must do on a motion to dismiss, and also considers "affidavits submitted by plaintiff[] to remedy any defects in the complaint." (Al Rushaid, 28 NY3d at 327 [internal quotation marks and citations omitted].) Applying this standard, the court holds that Tony's acts did not amount to purposeful activity by which he availed himself of the privilege of conducting business in New York. Pope does not allege that Tony himself engaged in any activities in New York. At most, Pope's claim that Tony transacted business in New York is based on the fact that Tony was an officer and director of PacNet at the time PacNet entered into the Pledge Agreement, by which it pledged its shares of PacNet Games as collateral for Pope's loan to PacNet Games and agreed that the shares would be held at a New York law firm. (See Pl.'s Supplemental Memo. at 6-9.)

Tony's status as an officer of PacNet is not sufficient, without more, to support jurisdiction over him based on the transaction of business in New York. The Court of Appeals has held that long-arm jurisdiction over a corporate representative of a non-domiciliary corporate defendant cannot be defeated by the "fiduciary shield doctrine," under which an individual may not be "subject[ed] to jurisdiction if his dealings in the forum State were solely in a corporate capacity." (Kreutter, 71 NY2d at 467-468.) In rejecting the application of this doctrine to CPLR 302 (a) (1), the Court reasoned that the statute does not "accord any special treatment to

fiduciaries acting on behalf of a corporation or . . . insulate them from long-arm jurisdiction for acts performed in a corporate capacity," (Id. at 470; Big Apple Pyrotechnics and Multimedia Inc. v Sparktacular Inc., 2007 WL 747807, * 6-7 [SD NY, Mar. 9, 2007, No. 05-Civ-9994 (KMW)] [applying New York law].) However, "the fact that New York does not adopt the fiduciary shield doctrine does not mean that a corporate officer is automatically subject to long-arm jurisdiction." Merck & Co., Inc. v Mediplan Health Consulting, Inc., 425 F Supp 2d 402, 419 [SD NY 2006], reconsid denied 431 F Supp 2d 425 [internal quotation marks and citation omitted].)

Rather, the courts require that the plaintiff plead or present facts showing that the corporate representative personally engaged in activities in New York or that the representative controlled the New York actor under an agency theory. (See e.g. Kreutter, 71 NY2d at 470 [finding jurisdiction under CPLR 302 (a) (1), where non-domiciliary principal of foreign corporations "was a primary actor in the transaction with [plaintiff] in New York, not some corporate employee in Texas who played no part in it"]; Coast to Coast Energy, Inc v Gasarch, 2017 Slip Op 02876, 2017 WL 1348434, * 1 [1st Dept 2017] [holding that individual defendant's "control" over New York actor, for purposes of establishing jurisdiction over individual under CPLR 302 (a) (1), "cannot be shown based merely upon a defendant's title or position within the corporation, or upon conclusory allegations that the defendant controls the corporation"] [internal quotation marks and citations omitted]; SNS Bank, N.V. v Citibank, N.A., 7 AD3d 352, 353 [1st Dept 2004] [holding that personal jurisdiction was never acquired over the directors of defendant non-domiciliary corporation, the Court reasoning that "[t]hese directors reside variously in the Caymans, Bermuda, England and Luxembourg, and all except two of them submitted affidavits stating that they conducted their directorial duties outside the

State of New York"]; Merck & Co. v Mediplan, 425 F Supp 2d at 419-20 [holding, under CPLR 302 (a) (1), that jurisdiction did not exist over CEO of corporate defendant, where complaint did not allege any facts showing that CEO transacted business in New York in his individual capacity, or any facts establishing jurisdiction over CEO on an agency theory, the Court noting that "[p]laintiffs have not alleged that [CEO] was a 'primary actor' in the matters in question; control cannot be shown based merely upon a defendant's title or position"].)[5]

Here, Pope does not plead or submit any evidence that Tony personally conducted activities in New York in connection with the transaction. The wholly conclusory allegations of the complaint that Tony controlled PacNet are likewise insufficient to support the exercise of jurisdiction over him or to warrant jurisdictional discovery.[6]

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[5] The cases relied upon by Pope are not to the contrary. They either involved an individual defendant who was the sole actor in the transaction (Irving Trust Co. v Smith, 349 F Supp 146 [SD NY 1972]), or addressed jurisdiction over a non-domiciliary corporation. (E.g. Nova Intl., Inc. v American Express Bank, Ltd., 1996 WL 39317 [SD NY, No 94-Civ-8536, Jan 31, 1996]; Catalyst Energy Dev. Corp. v Iron Mountain Mines, Inc., 630 F Supp 1314 [SD NY 1986].)

Pope also argues that the parties to the Pledge Agreement provided for the shares to be held in New York because they "intended . . . to ensure that Pope have a US-based remedy should there be a default in the loan." (Pl.'s Supplemental Memo. at 8.) In view of this court's holding that Pope's allegations and evidence are insufficient to show that Tony controlled PacNet or its entry into the Pledge Agreement, the court need not reach this argument. It is noted, however, that the listing of shares on a New York stock exchange is not sufficient, without more, to support the exercise of jurisdiction over a non-domiciliary. (Wiwa v Royal Dutch Petroleum Co., 226 F3d 88, 97 [2d Cir 2000], cert denied 532 US 941 [2001], questioned, as to its separate holding permitting assertion of jurisdiction based on the non-domiciliary defendant's agent's New York acts, by Brown v Lockheed Martin Corp., 814 F3d 619, 628-629 [2d Cir 2016], decided after Daimler AG v Bauman, 134 S Ct 746 [2014].) It is further noted that a New York choice of law provision, like that in the Pledge Agreement here (see section 20), "while relevant, is insufficient by itself to confer personal jurisdiction over the defendant in New York under CPLR 302 (a) (1)." (Executive Life Ltd. v Silverman, 68 AD3d 715, 717 [2d Dept 2009]; Shalik v Coleman, 111 AD3d 816, 818 [2d Dept 2013].)

It bears emphasis that an extensive, fact-driven body of law exists as to the circumstances under which jurisdiction may exercised even where a non-domiciliary primary actor has executed a guaranty payable in New York. (See e.g. First Natl. Bank & Trust Co. v Wilson, 171 AD2d 616 [1st Dept 1991]; Rielly Co., Inc. v Lisa B. Inc., 181 AD2d 269 [3d Dept 1992]; A.I. Trade Fin., Inc. v Petra Bank, 989 F2d 76 [2d Cir 1993]; Mago Intl. LLC v LHB AG, 2014 WL 2800751 [SD NY, June 18, 2014, No. 13-Civ-3370 (CM)].)

[6] Tony's contacts with New York thus differ materially from Victor's. In denying Victor's motion to vacate the default judgment against him, this court relied on evidence that Victor maintained a primary residence in New York, and that Victor acknowledged that, at least between 2003 and 2007, he was doing business in New York. (2013 WL 6515754 at * 2; * 2, n 2.) As discussed above (supra at 2, n 1) and in connection with Victor's motion, Victor also

In so holding, the court rejects Pope's contention that it is Tony's burden to "offer sufficient facts or documentary evidence to support [his] assertion" that the court lacks jurisdiction over him, including specifics about his role with PacNet or details of his travel to or contacts with New York. (See Pl.'s Memo. In Opp. at 15.) As discussed above (supra at 6), Tony came forward with evidence, in the form of his affirmation under penalties of perjury, and the affidavit of PacNet's former Director of Investor Relations, that Victor, not Tony, oversaw PacNet's U.S. operations and that Tony did not visit PacNet's U.S. office. Contrary to Pope's assertion, it remains Pope's burden "as the party seeking to assert jurisdiction . . . to present sufficient facts to demonstrate jurisdiction" (see Cotia (USA) Ltd., 134 AD3d at 484) or to make a "sufficient start" to warrant jurisdictional discovery. (See also Yu v Ma, 145 AD3d 577 [1st Dept 2016] [upholding vacatur of default judgment and dismissal of action under CPLR 301 (a) (1) and (2), where defendant averred that she never lived in or conducted business in New York, and "[i]n opposition, plaintiffs [did] not allege a single contact with New York, nor cite any connection defendant had to New York"]; Owens v Freeman, 65 AD3d 731 [3d Dept 2009].) As held above, Pope fails to meet this burden.

As Pope fails to plead or present sufficient facts to meet the first prong of CPLR 302 (a) (1) and thus to show that Tony transacted business in New York, the court need not determine whether the claim in this action arises out of the transaction and thus meets the second prong of this statute.

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personally signed a guaranty for up to $3,000,000 of outstanding amounts under the Note. (2013 WL 6515754 at * 5.)

CPLR 302 (a) (3)

Under CPLR 302 (a) (3), a plaintiff must show that tortious conduct without the state caused an injury "'within the state,' and that the elements of either clause (i) or (ii) have been satisfied." (Ingraham v Carroll, 90 NY2d 592, 596 [1997].) As discussed above (supra at 2-3), Pope alleges, in conclusory fashion, that Victor diverted funds invested by Pope in PacNet Games to entities controlled by Victor, and that PacNet, Victor, Tony, and others engaged in a scheme to transfer the funds to other entities controlled by PacNet or the Tong brothers.

For purposes of CPLR 302 (a) (3), "the situs of the injury is the location of the original event which caused the injury, not the location where the resultant damages are subsequently felt." (Cotia (USA) Ltd., 134 AD3d at 484 [internal quotation marks and citations omitted].) "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, 471-472 [1st Dept 2011]; accord McBride v KPMG Intl., 135 AD3d 576, 576 [1st Dept 2016].)

Here, there is no allegation that Pope, PacNet Games, and PacNet executed the Note and Pledge Agreement in New York or that Pope disbursed the funds to PacNet Games in New York. Significantly, there is also no allegation that the funds were diverted in New York, or that the scheme—by which PacNet, Victor, and Tony allegedly diverted the funds—was carried out in New York. The original event that caused the injury was therefore the fraudulent conveyance or diversion of funds outside New York. (See Cotia (USA) Ltd., 134 AD3d at 485 [holding, under CPLR 302 (a) (3), that the alleged tortious act—a fraudulent conveyance in New Jersey, rendering defendants unable to pay the New York plaintiff for goods shipped to defendants—

"did not cause injury within New York, but in New Jersey"]; Magwitch, L.L.C. v Pusser's Inc., 84 AD3d 529, 532 [1st Dept 2011], lv denied 18 NY3d 803 [2012] [holding, under CPLR 302 (a) (3), that "the injury was caused by misrepresentations about the transfer of assets and the transfer and diversion of funds, which occurred in the BVI and locations other than New York, and resulted in the unavailability of funds to pay plaintiff the amounts due on the note"].)

Moreover, the diminution in value of plaintiff's security interest in the Pledged Collateral held in New York is not sufficient to constitute an injury in New York within the meaning of CPLR 302 (a) (3). (See Oddo Asset Mgt. v Barclays Bank PLC, 2010 NY Slip Op 52449[U], 2010 WL 8748135, * 7-8 [Sup Ct, NY County, Apr. 21, 2010], affd on other grounds 84 AD3d 692 [1st Dept 2011] [holding, in action by plaintiff-investor against non-domiciliary defendant-collateral managers of an investment portfolio of securities held in New York, that the original events causing the plaintiff's injury—the loss of value of the portfolio—"occurred in England and Jersey, where the [] defendants made all the decisions to acquire the alleged impaired securities," not in New York where the securities were maintained].) Put another way, "it is plaintiff who was injured, not the securities themselves." (Id. at * 8.)

Pope cites federal authorities, involving fraudulent conveyances made outside New York, in which the Courts have upheld jurisdiction under CPLR 302 (a) (3). To the extent that these cases can be reconciled with the New York cases cited above, the conveyances have been of assets located in New York (see Rosa v TCC Communications, Inc., 2017 WL 980338, * 7 [SD NY, Mar. 13, 2017, No. 1-5CV-1665 (WHP)]); have been made by a party that otherwise had extensive New York contacts and caused the loss of business in New York (see Sunrise Indus.

Joint Venture v Ditric Optics, Inc., 873 F Supp 765, 770-771 [ED NY 1995])[7]; or have frustrated an existing or likely New York judgment (see Bank of Communications v Ocean Dev. Am., Inc., 2010 WL 768881, * 3-4 [SD NY, Mar. 8, 2010, No. 07-CV-4628 (TPG); Universitas Educ., LLC v Nova Group, Inc., 2014 WL 3883371, *6 [SD NY, Aug. 7, 2014, Nos. 11-CV-1590, 11-CV-8726 (LTS/HBP)].) Here, none of these factors is present. The diminution in the value of the stock held by Loeb & Loeb in New York is too remote and indirect a financial consequence of the alleged fraudulent conveyances by Tony to satisfy CPLR 302 (a) (3).

Even assuming that the situs of the injury is New York, Pope fails to allege sufficient facts to satisfy the elements of either clause (i) or (ii) of CPLR 302 (a) (3). Under clause (i), jurisdiction can be exercised only over "those who have sufficient contacts within this state so that it is not unfair to require them to answer in this state for injuries they cause here by acts done elsewhere." (Ingraham, 90 NY2d at 597 [internal quotation marks and citation omitted].) Under clause (ii), the non-domiciliary tortfeasor must have an expectation of New York consequences, but must also derive substantial revenue from interstate or international commerce. This clause precludes the exercise of jurisdiction over non-domiciliaries that are not "economically big enough to defend suit in New York" or "whose business operations are of a local character." (Id. at 598-599 [internal quotation marks and citation omitted].) Both clauses "were deliberately inserted to keep the provision well within constitutional bounds." (Id. at 597 [internal quotation marks and citations omitted].) Pope's assertion that Tony had "extensive transactional ties to New York" is unsupported by any evidentiary showing. (See Pl.'s Memo. In Opp. at 14.) It is

[7] As the New York Court of Appeals has observed, "it may make sense in traditional commercial tort cases to equate a plaintiff's injury with the place where its business is lost or threatened. . . ." (Penguin Group (USA) Inc. v American Buddha, 16 NY3d 295, 305 [2011] [reviewing cases, but declining to extend this concept to copyright infringement claim].)

therefore plainly insufficient to meet Pope's burden under clauses (i) and (ii) of the statute. (See generally Cotia (USA) Ltd., 134 AD3d at 485 [rejecting plaintiff's assertion of jurisdiction, where the fraudulent conveyance occurred outside New York and the plaintiff "offered nothing but conclusory allegations that any defendant 'derives substantial revenue from interstate or international commerce'"].) To the extent that Pope asserts that PacNet derived substantial revenues from interstate or international commerce, PacNet's activities cannot support assertion of jurisdiction over Tony because, as held above, Pope fails to present facts showing that Tony controlled PacNet. (See People v Orbital Pub. Group., Inc., 50 Misc 3d 811, 821-22 [Sup Ct, NY County 2015].)

General Jurisdiction and Remaining Claims

As Pope fails to present facts sufficient to show that jurisdiction may be exercised over Tony under CPLR 302 (a) (3), Pope also plainly fails to present facts showing the "quantity of New York contacts that is necessary to obtain general jurisdiction under the 'doing business' test of CPLR 301." (See generally Ingraham, 90 NY2d at 597.)

The court notes that the record contains extensive evidence that Tony had long-standing notice of this action against him in this action before serving this motion to vacate. (See e.g. Aff. of Thomas Watson [Pope's Receiver] In Opp. [attesting to attempts to enforce the New York judgment in California, dating to 2010].) The court is nevertheless constrained to vacate the judgment and dismiss the action against Tony based on the lack of personal jurisdiction over him.

In light of this court's holding that Pope has failed to allege that facts may exist to support jurisdiction over Tony pursuant to CPLR 301 or 302, the court need not address whether

service was proper or whether Tony has an excuse for his default and potentially meritorious defenses.

It is accordingly hereby ORDERED that the motion by defendant Tony Tong to vacate the default judgment against him and to dismiss the complaint is granted to the following extent:

It is ORDERED that the judgment entered on October 20, 2010 is vacated only as against Tony Tong, and the complaint as against Tony Tong is dismissed with prejudice; and it is further

ORDERED that plaintiff's motion to strike portions of the affirmation of Tony Tong, regarding service of the complaint, is denied as moot.

Dated: New York, New York
April 19, 2017

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