

Dizengoff v Hine Bldrs., LLC
2017 NY Slip Op 31090(U)
May 17, 2017
Supreme Court, New York County
Docket Number: 153819/16
Judge: Debra A. James
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
COUNTY OF NEW YORK: IAS PART 59

-----X
IRA DIZENGOFF and BETSEY DIZENGOFF,

Plaintiffs,

Index No.: 153819/16

-against-

Motion Seq. No. 001

HINE BUILDERS, LLC and TIMOTHY HINE,

Defendants.

-----X
DEBRA A. JAMES, J.S.C.:

Defendants move to dismiss plaintiffs' complaint for lack of personal jurisdiction (CPLR 3211 [a] [8]) and forum non conveniens (CPLR 327). In the alternative, defendants seek to stay this action in favor of the pending arbitration proceeding in Connecticut.

According to the complaint in this action, in the summer of 2014, the Dizengoffs and defendant Hine Builders began discussing an agreement to build a house for the Dizengoffs in Bridgewater, Connecticut. These phone discussions took place between the Dizengoffs in New York and defendant Timothy Hine, Hine Builders' principal, in Connecticut. Over the next several months, Hine and the Dizengoffs engaged in negotiations by telephone and met once in person in New York, although the parties dispute the location of these communications. Finally, on November 23, 2014, the parties entered into a "Standard Form of Agreement Between Owner and Contractor" (the Agreement) in Connecticut, which

governed their agreement.

Around January 31, 2015, the Dizengoffs allege that Hine Builders and Hine himself began defrauding them in a number of different ways. Defendants allegedly submitted applications for payment that included materials and services not approved by the Dizengoffs, including changing the type of materials used and the installation steps for those materials. Hine Builders allegedly submitted requests for payment that included time spent by Hine and the site supervisor, which neither actually spent on the project, and for which defendants allegedly refused to provide documentation. In addition, defendants are alleged to have billed for work that was not complete, billed for more than they paid to subcontractors, and purchased unnecessary materials in order to receive a 16% contractor's fee on the cost of the materials.

On January 20, 2016, as a result of these alleged improper practices, the Dizengoffs terminated the agreement. Hine claims that they had already stopped paying him and that he had, in fact, given notice that Hine Builders would stop work if the Dizengoffs did not pay what was owed. After the contract was terminated, the Dizengoffs allege that Hine and Hine Builders interfered with their post-termination contractual rights. Specifically, that defendants removed materials from the site in

violation of Section 14.2.2 of the General Conditions, and tortiously interfered with the Dizengoffs' assumption of contracts with the subcontractors by convincing them not to work on the project, claiming that the Dizengoffs fraudulently terminated the Agreement, and telling them to bill the Dizengoffs for money that is not owed. In addition, Hine Builders allegedly installed security cameras on the property without the Dizengoffs' consent—which the Dizengoffs only discovered post-termination – and placed a mechanics lien on the property. Defendants deny these allegations, claim that the cameras were required as part of the necessary liability insurance, and that the mechanic's lien is valid.

Plaintiffs commenced this action alleging intentional misrepresentation and fraud, negligent misrepresentation and fraud, tortious interference with contract, intentional infliction of emotional distress, negligent infliction of emotional distress, tortious intrusion upon seclusion under Connecticut law, and trespassing and conversion under Connecticut law.

Lack of Personal Jurisdiction¹

¹As plaintiffs fail to oppose defendants' argument that there is no general jurisdiction over defendants under CPLR 301 (incorporation or principal place of business in New York State), the court finds that there is in personam jurisdiction over defendants under that statute.

A. CPLR 302 (a) (1)

Defendants move to dismiss the complaint on the basis that the court lacks jurisdiction under CPLR 302 (a) (1).

CPLR 302 (a) (1) provides that a non-domiciliary who "transacts any business within the state or contracts anywhere to supply goods or services in the state" may be subject to the Court's personal jurisdiction. "CPLR 302 [a] [1] 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" (Fischbarg v Doucet, 9 NY3d 375, 380 [2007] [internal quotation marks and citation omitted]). A defendant must "avail[] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws" (id. [internal quotation marks and citation omitted]). "[E]ven when physical presence is lacking, jurisdiction may still be proper if the defendant on his [or her] own initiative . . . project[s] himself [or herself] into this state to engage in a sustained and substantial transaction of business" (id. at 382 [internal quotation marks and citation omitted]). "[I]t is not the quantity but the quality of the contacts that matters" (Paterno v Laser Spine Inst., 24 NY3d 370, 378 [2014]).

Here, the parties' agreement was for defendants to provide a

service—building a house—in Connecticut; therefore, in order for jurisdiction to be proper under CPLR 302 (a) (1) defendants must have transacted business within New York. Plaintiffs claim that defendants have transacted business within New York because they regularly met with plaintiffs in New York to solicit plaintiffs' business, sent invoices and claims to plaintiffs in New York, spoke with plaintiffs on the phone while plaintiffs were in New York, were paid out of a New York bank account, contracted with subcontractors who worked on projects in New York, purchased materials from New York vendors, and interfered with the contracts of subcontractors who do business in New York. Defendants dispute several of their alleged contacts with New York, but on this motion, the court must take the facts alleged in the complaint as true (Leon v Martinez, 84 NY2d 83, 87 [1994]).

Nevertheless, as defendants correctly argue, the

"mere solicitation of business within the state does not constitute the transaction of business within the state, unless the solicitation in New York is supplemented by business transactions occurring in the state, or the solicitation is accompanied by a fair measure of the defendant's permanence and continuity in New York"

(O'Brien v Hackensack Univ. Med. Ctr., 305 AD2d 199, 201 [1st Dept 2003]).

The transaction in this action was to build a house in

Connecticut, regardless of the parties' location during communications related to the project. Electronic and written communications between the parties are not sufficient contacts to warrant jurisdiction over defendants (see Paterno v Laser Spine Inst., 112 AD3d 34, 42 [2d Dept 2013], affd 24 NY3d 370 [2014] [no jurisdiction where communications during the transaction were related to doing business outside of New York]). Nor is evidence of a New York bank account, or invoices and claims sent to a New York address sufficient for the court to exercise jurisdiction (see Shalik v Coleman, 111 AD3d 816, 818 [2d Dept 2013] [choice of law provision, electronic communications, and payments mailed to New York insufficient for personal jurisdiction over defendant]; Magwitch, L.L.C. v Pusser's Inc., 84 AD3d 529, 531 [1st Dept 2011] ["The acts of sending payments to a New York bank account and correspondence to a New York address, and engaging in telephone discussions with plaintiff's principal, who also was defendants' legal advisor while he was in New York, were not a sufficient basis to satisfy the statutory requirements"])).

Plaintiffs also allege that there were several meetings in New York with defendants after the contract was signed, contracts with third parties that may have done business in New York at other times, and purchases of materials by defendants in New York. However, plaintiffs provide only conclusory allegations,

most of which are not alleged in the complaint, which are devoid of any information regarding the dates and details of those meetings and contracts. These allegations are insufficient to survive a motion to dismiss (Cotia (USA) Ltd. v Lynn Steel Corp., 134 AD3d 483, 484 [1st Dept 2015] ["Plaintiff has offered nothing but conclusory assertions to support long-arm jurisdiction under CPLR 302 (a) (1) . . . as the party seeking to assert jurisdiction, the burden belongs to plaintiff to present sufficient facts to demonstrate jurisdiction"]). Plaintiffs provide substantiated allegations related to only one meeting in New York prior to the execution of the parties' agreement, and the Court of Appeals has long held that meetings within New York related to transactions outside of New York are not alone sufficient to confer jurisdiction (see Presidential Realty Corp. v Michael Sq. W. Ltd, 44 NY2d 672, 673 [1978] ["physical presence alone cannot talismanically transform any and all business dealings into business transactions" under CPLR 302 (a) (1)]). Where the transaction at the core of this action took place outside of New York, the limited contacts cited by plaintiffs are simply insufficient to confer jurisdiction over defendants pursuant to CPLR 302 (a) (1).

B. CPLR 302 (a) (3)

Defendants also claim that the court lacks jurisdiction

pursuant to CPLR 302 (a) (3), which confers jurisdiction over a defendant who

"commits a tortious act without the state causing injury to person or property within the state . . . 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."

"The determination of whether a tortious act committed outside New York causes injury inside the state is governed by the 'situs-of-injury' test, requiring determination of the location of the original event that caused the injury" (Magwitch, L.L.C., 84 AD3d at 532). "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]). "[T]he plaintiff cannot be the only link between the defendant and the forum. Rather, it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him" (Walden v Fiore, __ US __, 134 S Ct 1115, 1122 [2014]).

Plaintiffs claim that the court has jurisdiction because they are New York residents and were damaged in New York.

Plaintiffs' claimed damages, however, are solely economic. As the complaint clearly alleges, the claims between the parties arise out of the building project in Connecticut. Critical events associated with their claims occurred in Connecticut. The alleged improper changes to the project were made in Connecticut. The materials that are the subject of the conversion claim were allegedly taken from the Connecticut building site, the cameras were allegedly improperly installed there, and defendant Hine allegedly engaged in conduct in Connecticut that interfered with plaintiff's assumptions of subcontracts related to the project. Plaintiffs' reliance to the contrary on Levisohn, Lerner, Berger & Langsam v Medical Taping Sys. (10 F Supp 2d 334 [SD NY 1998]) is unavailing. There, "the individual defendants' tortious conduct was intended to avoid an obligation to a New York entity under a contract negotiated and partially executed in New York. The tortious conduct was therefore *designed* to injure LLBL in New York" (id. at 343). Here, by contrast, the contract was executed in Connecticut and all of defendants' alleged tortious conduct was related to a Connecticut building project. Similarly, Urfirer v SB Bldrs., LLC (95 AD3d 1616 [3d Dept 2012]), a case involving a New York construction project and unpaid New York subcontractors, is distinguishable. Thus, plaintiffs fail to allege that defendants committed any tortious acts in Connecticut

that caused injury within the State.

Plaintiffs also fail to satisfy the remaining requirements of jurisdiction under CPLR 302 (a) (3). As the court has already noted, plaintiffs did not oppose or address defendants' argument that there is no general jurisdiction over them in New York pursuant to CPLR 301², and do not allege that defendants "regularly do or solicit business" in New York for purposes of CPLR 302 (a) (3). Further, amid a host of conclusory and unsupported allegations, plaintiffs point to only one project in New York involving defendants, which is insufficient to show defendants "derive[] substantial revenue from interstate or international commerce" (CPLR 302 [a] [3]).

Thus, the court finds that it lacks personal jurisdiction over defendants in this action and shall grant the motion of defendants to dismiss the complaint against them on that ground.³

²

"A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore." "[T]here is no basis for general jurisdiction pursuant to CPLR 301, since [defendant] is not incorporated in New York and does not have its principal place of business in New York (see Daimler AG v Bauman, 134 ___US___ 746, 750 [2014]). Similarly, no jurisdiction lies pursuant to CPLR 301 over [defendant's] founder..[as] he is not domiciled here." (Magdalena v Lins, 123 AD3d 600, 601 [1st Dept 2014] [internal quotation marks and citation omitted]).

³ Plaintiffs argue that they have made a sufficient start towards establishing a basis for personal jurisdiction and are therefore entitled to jurisdictional discovery. However, their sweeping allegations regarding defendants' alleged business transactions in New York or elsewhere outside of Connecticut do not demonstrate that "facts may exist" that would confer jurisdiction

In view of the foregoing, the court need not address the balance of this application.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: May 17, 2017

ENTER:



DEBRA A. JAMES, J.S.C.

(see, e.g., Peterson v Spartan Indus., 33 NY2d 463, 466 [1974]).