

Concotilli v Brown

2017 NY Slip Op 31282(U)

June 15, 2017

Supreme Court, New York County

Docket Number: 155423/2016

Judge: Erika M. Edwards

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

CORRINE CONCOTILLI d/b/a BLACK ARROW
PRESS,

Index No.: 155423/2016

DECISION/ORDER

Plaintiff,

-against-

SCOT BROWN,

Defendant.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits/Affirmations/ Memos of Law annexed	<u>1</u>
Opposition and Affidavits/Affirmations/ Memos of Law annexed	<u>2</u>
Reply	<u>3</u>

ERIKA M. EDWARDS, J.:

Plaintiff Corrine Concotilli d/b/a Black Arrow Press (“Plaintiff”) brought this action against Defendant Scot Brown (“Defendant”) seeking to recover damages for libel for Defendant’s alleged defamatory statements posted on Defendant’s company’s website accusing Plaintiff of selling counterfeit merchandise and copying a logo to falsely purport to sell official products. Plaintiff is a Massachusetts resident and owner of a Massachusetts business which sells and markets energy products. Defendant is an Arizona resident and a manager and member of an Arizona limited liability company which sells holistic supplies and operates a website.

Defendant moves to dismiss Plaintiff’s complaint at the pre-answer stage based on lack of personal jurisdiction, pursuant to CPLR 3211(1)(8), because Plaintiff failed to establish proper long-arm jurisdiction over Defendant and failed to allege any evidence to pierce the corporate

veil and hold Defendant liable for the alleged acts of his company. Based on the evidence presented, the court grants Defendant's motion to dismiss for lack of personal jurisdiction.

Defendant alleges that he is an Arizona resident, he was served in Arizona, he does not own any property in New York, he does not conduct business in New York and he lacks the minimum contacts necessary to invoke jurisdiction. Plaintiff opposes the motion and argues in substance that New York has personal jurisdiction over Defendant under 302(1) because Defendant's website was accessible to New York residents, so we can assume Defendant engaged in some business transactions in New York, and the defamation claims have some connection to those transactions. Additionally, Plaintiff argues that Defendant's website is not just a passive one because Defendant solicits business, permits customer interaction, invites comments, facilitates credit card purchases, sells to anyone, including New Yorkers.

When considering a motion to dismiss Plaintiff's complaint for lack of personal jurisdiction, pursuant to CPLR 3211(a)(8), the court must determine whether service was timely and proper. To determine whether service was timely, CPLR 306-b requires service of the summons and complaint to be made within 120 days after the commencement of the action (CPLR 306-b). Here, service appears to be timely.

Defendant is an Arizona resident. Pursuant to CPLR 302(a)(1), a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent transacts any business within the state or contracts anywhere to supply goods or services in the state (CPLR 302[a][1]). Due process requires that to exercise personal jurisdiction over a non-domiciled defendant, the non-domiciled defendant must have minimum contacts with New York so that the action does not offend traditional notions of fair play and substantial justice (*Int'l Shoe Co. v Wash.*, 326 US 310, 316 [1945]). Due process is not

offended so long as the defendant avails himself of the benefits of New York law, has sufficient minimum contacts with New York and should reasonably expect to defend his actions here, even if he was not present in the state (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 466-467 [1988]; *see McGowan v Smith*, 52 NY2d 268, 271 [1981]).

CPLR 302(a)(1) is a single act statute, and proof of one transaction in New York is sufficient to invoke personal jurisdiction, even though the defendant never enters New York, so long as the defendant's New York activities were purposefully directed at New York residents and there is a substantial relationship between the transaction and the claim asserted (*see id.*; *Burger King v Rudzewicz*, 471 US 462, 476 [1985]; *Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 71 [2006]). Isolated contacts may support jurisdiction only if a substantial connection with the forum state is created and such contacts must be more than random, fortuitous, or attenuated (*Burger King*, 471 US at 475).

As such, courts must consider the totality of the nonresident defendant's activities within New York or a combination of factors to determine whether its contacts satisfy the transacting business requirement (*see Farkas v Farkas*, 36 AD3d 852, 853 [2d Dept 2007]; *Longines-Wittnauer Watch Co. v Barnes & Reinecke*, 15 NY2d 443, 457-458 [1965]). It is the quality of the defendant's New York contacts that is of primary consideration, not the quantity (*Fischbarg v Doucet*, 9 NY3d 375, 380 [2007]). Therefore, the mere shipment of goods to New York, the maintenance of a passive commercial website to provide information about a business, solicitation of business in New York, or communication to a party in New York alone are insufficient contacts to establish long-arm jurisdiction without additional purposeful activities in New York.

Courts consider several factors, but have held that merely posting defamatory material on a website accessible in New York, without more, does not constitute transacting business in New York for purposes CPLR 302(a) (*Realuyo v Villa Abrille*, 2003 US Dist LEXIS 11529 [SDNY 2003]). Long-arm Internet jurisdiction was rejected by a court in a defamation case involving an Iowa defendant who posted a business-damaging statement on his website because the court found that the defendant lacked minimal New York contacts, that defendant did not transact business in New York and that the suit did not arise from any such transaction as required for jurisdiction (*Best Van Lines, Inc. v Walker*, 490 F3d 239 [2007]). The court further found that although the website was accessible to anyone anywhere in the world, it was insufficient to show that defendant transacted business in New York or that he purposefully availed himself of the privilege of conducting activities within New York (*id.* at 250, 253).

In *Grimaldi v Guinn*, which was cited by Plaintiff, the Second Department found jurisdiction over a Pennsylvania mechanic based on the totality of the circumstances because of the number, nature and timing of the contacts involved (*Grimaldi v Guinn*, 72 AD3d 37 [2d Dept 2010]). In this case, plaintiff shipped a car from New York to defendant in Pennsylvania, defendant initiated the contact after his initial involvement and defendant advertised his business on his website for commercial access (*id.*). The court found that defendant engaged in the purposeful creation of a continuing relationship with plaintiff for over a year (*id.*).

Furthermore, another court found jurisdiction over an out-of-state defendant who had an active website for the sale of weapons, sold a gun to a New York plaintiff after sending pictures of additional guns for sale via email, shipped the gun to New York and had the gun shipped back and forth to make necessary repairs (*Mishin v Motes*, 2015 NY Slip Op 51492[U] [Nassau Dist Ct 2015]).

Plaintiff has the burden of establishing personal jurisdiction over Defendant. Here, Plaintiff failed to establish that Defendant had minimum contacts to New York necessary to obtain personal jurisdiction over Defendant. Plaintiff failed to establish that Defendant purposefully engaged in sufficient activities in New York, that he conducted or transacted business in New York, that he availed himself of the benefits of New York law, that Defendant's activities were purposefully directed toward New York residents, that the alleged defamatory comments were directed toward New York residents, or that there was a substantial relationship between the New York transaction and the alleged defamatory statements to obtain personal jurisdiction over Defendant.

Additionally, since the alleged defamatory statement was posted on a limited liability company's website, and Defendant is the company's manager, for Plaintiff to hold Defendant personally liable for the actions of the company, Plaintiff must demonstrate that Defendant, as an owner, exercised complete domination of the corporation with respect to the transaction attacked and that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury (*Morris v State Dep't of Taxation & Fin.*, 82 NY2d 135, 141 [1993] [internal quotations and citations omitted]). There must be some showing of a wrongful or unjust act toward plaintiff and that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against plaintiff such that a court in equity will intervene (*id.* at 141-142 [internal citation omitted]). Here, Plaintiff failed to produce any evidence to pierce the corporate veil and hold Defendant personally responsible for the company's website.

Accordingly, it is hereby

ORDERED that Defendant Scot Brown's motion to dismiss Plaintiff Corrine Concotilli, d/b/a Black Arrow Press' complaint as against Defendant is granted and the complaint is dismissed in its entirety as against Defendant, with prejudice and without costs and the Clerk is directed to enter judgment in favor of Defendant.

Dated: June 15, 2017



HON. ERIKA M. EDWARDS