

Albion & Heath LLC v Hencor Capital Inc.
2017 NY Slip Op 31949(U)
September 13, 2017
Supreme Court, New York County
Docket Number: 652976/2016
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

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ALBION & HEATH LLC, GSC FORWARDING COMPANY, INC.		INDEX NO. <u>652976/2016</u>
Plaintiff,		MOTION DATE <u>4/5/2017</u>
- v -		MOTION SEQ. NO. <u>002</u>
HENCOR CAPITAL INC., PAUL CORRIVEAU,		
Defendant.		DECISION AND ORDER

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BRANSTEN, J.

In this action, plaintiffs Albion & Heath LLC (“Albion”) and GSC Forwarding Company, Inc. (“GSC Forwarding”) bring claims for tortious interference with contract, tortious interference with business relations, breach of confidence, misappropriation of confidential and proprietary business information, and declaratory judgment against defendants Hencor Capital Inc. (“Hencor”) and Paul Corriveau (“Corriveau”) arising from Hencor’s alleged disclosure of GSC Forwarding’s confidential information to third parties. Defendants now seek dismissal of the Verified Complaint pursuant to CPLR 3211(a)(8), CPLR 327(a), and CPLR 3211(a)(1) and (7).

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I. Background

Non-party Future Beach Leisure Products Corporation (“Future Beach”) is a Canadian corporation that manufactures plastic consumer recreational products that are sold to large retail chain stores throughout Canada and the United States. Compl. ¶ 6. Non-party GSC Technologies Corp. (“GSC Technologies”), a Canadian corporation, and plaintiff GSC Forwarding, a New York corporation, are affiliates of Future Beach. (Future Beach, GSC Technologies, and GSC Forwarding are collectively referred to as the “GSC Entities”). *Id.*

On September 22, 2014, GSC Technologies and Future Beach executed a letter of intent with defendant Hencor and non-party Champlain Financial Corporation (“Champlain Financial”), which memorialized Defendants’ interest in the purchase of the GSC Entities (the “First Hencor LOI”). *Id.* ¶ 12. Both Hencor and Champlain Financial are Canadian corporations.

The First Hencor LOI contained a confidentiality clause that provided

[t]he parties shall treat as confidential, the existence of this letter of intent including the fact that the parties are discussing a Proposed Transaction. All information provided to a party by the other or its representative shall be kept in the strictest confidence and not disclosed to a third party or used by the party receiving such information save and except for the consideration and completion of the Proposed Transaction . . .

Jason Farber Affid. in Supp. of Pl.s’ Motion, Ex. 1 ¶ 11. In addition, Hencor, Champlain Financial, and GSC Technologies entered into a confidentiality agreement, dated October 1, 2014, which designated all documents exchanged in connection with the proposed

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transaction as confidential and prohibited dissemination of confidential information to anyone other than Defendants' representatives or their affiliates. Compl. ¶¶ 17-18.

The First Hencor LOI contained an exclusivity period that expired in early 2015. After the exclusivity period expired, the parties executed a substantially similar LOI, dated September 28, 2015 (the "Second Hencor LOI"). *Id.* ¶ 19. The Second Hencor LOI contained an exclusivity period that expired on February 29, 2016. *Id.* ¶ 19. By February 29, 2016, the parties did not have materially complete transaction documents or material terms. *Id.* ¶ 20. Defendants requested an extension of the exclusivity period, which the GSC Entities denied. *Id.* ¶ 23. Thereafter, GSC Technologies continued discussions with Hencor and Champlain Financial, but also entered into discussions with plaintiff Albion. *Id.* ¶ 24.

Plaintiffs allege Defendants breached their confidentiality obligations by disclosing confidential information to potential third party purchasers of the GSC entities, namely non-party Clearspring Capital Partners ("Clearspring"), a Canadian private equity firm. *Id.* ¶ 27. The confidential information allegedly disclosed included customer lists and product item cost and profitability by customer. *Id.* ¶ 29. Moreover, Defendants allegedly represented to third parties that Hencor had an exclusive arrangement to purchase the GSC Entities. *Id.* ¶ 43. Plaintiffs requested Defendants return or destroy the confidential information in their possession, cease and desist from further disclosure, and disclose all persons with whom the confidential information was shared. *Id.* ¶ 30. Defendants have allegedly failed to comply with Plaintiffs' requests. *Id.* ¶ 31.

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On March 14, 2016, Albion executed a Letter of Intent with GSC Technologies (the “Albion LOI”) memorializing their agreement to negotiate Albion’s purchase of the GSC Entities, together with an unnamed “strategic partner.” *Id.* ¶ 35. The “strategic partner” agreed to pay Albion \$3,100,000 Canadian Dollars in exchange for bringing it into the transaction. *Id.* ¶ 37. Plaintiffs allege Hencor’s disclosure of confidential information and representation that it has an exclusive contract to purchase the GSC Entities has hindered Plaintiffs’ ability to consummate the Albion transaction and engage in discussions with other potential bidders. *Id.* ¶ 38.

II. Procedural History

Plaintiffs commenced this action on June 7, 2016 by filing a Summons and Verified Complaint, alleging claims for tortious interference with contract, tortious interference with business relations, breach of confidence, misappropriation of confidential and proprietary business information, and declaratory judgment. On the same day, Plaintiffs moved for a preliminary injunction enjoining Defendants from breaching their confidentiality obligations and representing they had exclusivity or a contract to purchase any of the GSC Entities. Defendants cross-moved to dismiss the Verified Complaint.¹

On January 18, 2017, Defendants moved to supplement the record on the pending motion to dismiss to include a newly acquired supplemental affidavit of Pierre Simard.

¹ This Court denied Plaintiff’s motion for a preliminary injunction on the August 3, 2016 record and transcript (Lisa De Crescenzo, O.C.R.) at 34:5-36:4. Thus, this written decision pertains solely to Defendants’ cross-motion to dismiss the Verified Complaint.

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The supplemental affidavit was submitted to correct several alleged inaccurate statements in the previously submitted Simard Affidavit, dated June 7, 2016 (NYSCEF No. 20). This Court granted Defendants' motion to supplement the record by Order and Decision dated April 5, 2017. Furthermore, this Court granted Plaintiffs' request to conduct limited discovery into the issue of jurisdiction.

III. Discussion

Defendants seek dismissal of the Verified Complaint pursuant to CPLR 3211(a)(8), CPLR 327(a), and CPLR 3211(a)(1) and (7).

Defendants first seek dismissal based on lack of personal jurisdiction pursuant to CPLR 3211(a)(8). Plaintiffs, as the parties seeking to assert jurisdiction, bear the burden of presenting sufficient facts to demonstrate this Court has either general or specific jurisdiction over the Defendants. *See Cotia (USA) Ltd. v. Lynn Steel Corp.*, 134 A.D.3d 483, 484 (1st Dep't 2015).

A. General Jurisdiction

Defendants argue the Verified Complaint lacks factual allegations suggesting that Defendants have any ties to New York. "A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Daimler AG v. Bauman*, 134 S.Ct. 746, 754

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(2014). In *Daimler*, the Supreme Court brought an end to “doing business” jurisdiction, holding that a corporation must be “at home” in a state in order to assert general jurisdiction over it. *See id.* at 751. The paradigm forum for general jurisdiction over a corporation is the state of incorporation or the corporation’s principal place of business. *Id.* at 760. For individuals, the paradigm forum is the state in which the individual is domiciled. *Id.*

Plaintiffs concede both Defendants are foreign; defendant Corriveau is a Canadian citizen and Hencor is a Canadian corporation. Compl. ¶¶ 8-9. However, Plaintiffs argue general jurisdiction is imputed to Defendants through their relationships with non-parties Traxxall Technologies Inc. and Traxxall Services Inc. (collectively “Traxxall”), and Champlain Capital. Nevertheless, Plaintiffs must show Hencor had “continuous and systematic” affiliations with New York such that Hencor would essentially be “at home” here. *See Daimler*, 134 S.Ct. at 754. Plaintiffs do not assert Defendants had any contact with New York, other than their relationship with Traxxall and Champlain Capital. Thus, Defendants would not be “at home” in New York and New York may not exercise jurisdiction over it under CPLR 301. *See id.*; *Magdalena v. Lins*, 123 A.D.3d 600, 601 (1st Dep’t 2014).

B. Specific Jurisdiction

Under CPLR 302, the “long-arm” statute, New York courts may acquire personal jurisdiction over foreign corporations if the cause of action arises from defendant’s transaction of business in New York. *Pub. Adm’r of N.Y. Cnty. v. Royal Bank of Canada*,

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19 N.Y.2d 127, 130-31 (1967). A court determining whether it has jurisdiction over an out-of-state defendant must carefully evaluate the quality and nature of defendant's contacts to ensure the assertion of jurisdiction is compatible with the requirements of due process. *See Fischbarg v. Doucet*, 9 N.Y.3d 375, 384-85 (2007). Specific jurisdiction can be only exercised where a defendant purposefully "avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* at 380.

Plaintiffs argue this Court has jurisdiction over Defendants pursuant to CPLR 302(a)(1), (2), and (3). Each of Plaintiffs' arguments will be addressed in turn.

1. *CPLR 302(a)(1)*

Plaintiffs argue Defendants transacted business in New York (1) by sending a financial consulting firm to New York to obtain materials from GSC Forwarding, (2) through Defendants' partnership with Champlain Capital, (3) through Defendants' relationship with Traxxall, and (4) by attempting to purchase GSC Forwarding.

CPLR 302(a)(1) provides a court may exercise personal jurisdiction over a non-domiciliary, who in person or through an agent "transacts any business within the state or contracts anywhere to supply goods or services in the state." Under the CPLR 302(a)(1) jurisdictional analysis, the defendant must have conducted sufficient activities to have transacted business in the state and plaintiff's claims must arise from those transactions. *Al Rushaid v. Pictet & Cie*, 28 N.Y.3d 316, 323 (2016).

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A non-domiciliary defendant transacts business in New York “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.” *Paterno v. Laser Spine Inst.*, 24 N.Y.3d 370, 377 (2014) (internal quotation marks omitted). Purposeful avilment occurs when the non-domiciliary “seeks out and initiates contact with New York, solicits business in New York, and establishes a continuing relationship.” *Id.* Plaintiffs do not argue Defendants conducted business in New York. Instead, Plaintiffs argue jurisdiction is imputed to Defendants by their contact with Richter LLP, Champlain Capital, Traxxall, and GSC Forwarding.

a. *Richter LLP*

After the First Hencor LOI was executed, Hencor retained Richter LLP, a Montreal based financial consulting firm, to support their due diligence efforts. Second Farber Affid. ¶ 4-5. Jason Farber, shareholder and manager of GSC Forwarding, attests to his belief that Richter LLP “physically came to GSC Forwarding’s New York warehouse to obtain information . . . and inspect the facility as a part of their due diligence process”. *Id.* ¶ 5. However, Marc Yedid, a partner of Richter LLP who was involved in the due diligence work and preparation of the due diligence report, attests that Richter LLP never went to New York to conduct due diligence for the proposed acquisition. Yedid Affid. ¶ 4. Thus, Plaintiffs fail to establish Defendants transacted business in New York by sending Richter LLP to inspect GSC Forwarding’s warehouse located in New York.

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b. *Champlain Capital*

Next, Plaintiffs argue New York has jurisdiction over Defendants based on Hencor's partnership with Champlain Capital, a US-based entity and a corporation registered to do business in New York. *See* Second Dee Affirm. Ex. 8. However, the First and Second Hencor LOIs list Hencor and Champlain *Financial* as "Sponsors" to the proposed transaction, not Champlain *Capital*. *See* Farber Affid. Ex. 1. Champlain Financial is a Canadian corporation. Supp. Simard Affid. ¶ 6. The US-based Champlain Capital did not partake in any discussions with Defendants and did not have any agreements in connection with the proposed acquisition. *Id.* ¶ 8. Thus, Plaintiffs' argument that jurisdiction is imposed on Hencor through its relationship with Champlain Capital fails.

c. *Traxxall*

Plaintiffs also argue jurisdiction is established through Hencor's relationship with Traxxall, which is a corporation registered to conduct business in New York. *See* Second Dee Affirm. ¶ 8, Ex. 5.

i. *Traxxall as Hencor's Alter-Ego*

First, Plaintiffs contend Traxxall is Hencor's alter-ego. A plaintiff claiming alter-ego liability is required to show (1) complete domination of the corporation with respect to the transaction attacked and (2) that such domination was the instrument of fraud or

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otherwise resulted in wrongful or inequitable consequences to the plaintiff. *See TNS Holdings v. MKL Sec. Corp.*, 92 N.Y.2d 335, 339 (1998).

Plaintiffs argue Traxxall and Hencor have overlapping management and ownership. Corriveau is the Managing Director of Hencor and Vice-Chairman of Traxxall. *See Second Dee Affirm.* ¶ 9, Ex. 6. Scott Henderson is also a Managing Director at Hencor and Chief Executive Officer of Traxxall. *Id.* ¶¶ 34-35. Plaintiffs further attest that Hencor used Traxxall's people, funds, and facilities to support the potential acquisition of the GSC Entities. *Second Farber Affid.* ¶ 33. However, Plaintiffs do not argue nor offer any evidence of Hencor's "complete domination" of Traxxall, or vice versa. *See Hartej Corp. v. Pepsico World Trading Co., Inc.*, 255 A.D.2d 233, 233 (1st Dep't 1998) (dismissing action where plaintiff failed to provide evidence of self-dealing, commingling of funds, lack of corporate formalities or other veil-piercing indicia). Therefore, Plaintiffs fail to establish Traxxall is Hencor's alter-ego.

ii. *Traxxall as an Affiliate of Hencor*

In the alternative, Plaintiffs argue Traxxall is an affiliate of Hencor. In New York, jurisdiction over a foreign corporation may be established through a parent-subsidary relationship, where the subsidiary's activities are such that the subsidiary is, "in fact, merely a department of the parent." *Delagi v. Volkswagenwerk A.G.*, 29 N.Y.2d 426, 432 (1972).

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The essential factor to the assertion of jurisdiction over a foreign corporation is common ownership. *See OneBeacon Am. Ins. Co. v. Newmont Mining Corp.*, 82 A.D.3d 554, 555 (1st Dep't 2011). "Nearly identical ownership interests must exist before one corporation can be considered a department of another corporation for jurisdictional purposes." *Id.* The other three factors are (1) the subsidiary's financial dependency on the parent corporation, (2) the degree the parent corporation fails to observe corporate formalities and interferes in the selection of the subsidiary's executive personnel, and (3) the degree of control over the marketing and operational policies of the subsidiary. *See Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*, 751 F.2d 117, 120 (2d Cir. 1984) (applying New York law).

According to the Quebec corporate registration documents provided to the Court, Traxxall Technologies is owned by the Scott Henderson Family Trust, Paul Corriveau Family Trust, and Vittorio Armenti Family Trust, while Hencor is owned by 8600848 Canada Inc. and 8600830 Canada Inc. *See* Second Dec Affirm. ¶¶ 6-7, Exs. 3-4. The registration documents further provide that Corriveau and Henderson are the sole shareholders of 8600848 Canada Inc. and 8600830 Canada Inc., respectively.

The Court recognizes Corriveau and Henderson both have an interest in the ownership of Traxxall and Hencor. However, Plaintiffs have not provided sufficient facts for the Court to find Corriveau and Henderson's ownership of Traxxall through the family trusts is effectively the same as their ownership of Hencor through the Canada Inc. corporations. In addition, the fact that the Vittorio Armenti Family Trust owns a portion

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of Traxxall Technologies weighs against the finding that Hencor and Traxxall have “nearly identical ownership interests.” *See OneBeacon*, 82 A.D.3d at 555 (finding common ownership lacking where 49% of the corporation was owned by an independent corporation).

Moreover, even if the Court were to find that Plaintiffs met their burden of establishing “nearly identical ownership interests,” Plaintiffs’ argument would still fail because Plaintiffs do not allege any facts regarding Traxxall or Hencor’s financial independence, adherence to corporate formalities, or control over marketing and operational policies. *See Volkswagenwerk*, 741 F.2d at 120-22. Therefore, Plaintiffs fail to establish jurisdiction over Hencor through its relationship with Traxxall.

d. *Undertaking to Purchase GSC Forwarding*

Finally, Plaintiffs argue the fact Defendants undertook to purchase GSC Forwarding, a New York corporation, is sufficient to establish jurisdiction pursuant to CPLR 302(a)(1). The Court may assert jurisdiction over defendants, even if they never physically entered New York, if defendants purposefully created a continuing relationship with a New York corporation. *See Fischbarg v. Doucet*, 9 N.Y.3d 375, 381 (2007). Here, the purchase agreement was never signed and the proposed acquisition was never completed. Thus, a continuing business relationship with GSC Forwarding was never created. *See M. Shanken Commc'ns, Inc. v. Variant Events, LLC*, No. 10 CIV. 4747 CM,

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2010 WL 4159476, at *5 (S.D.N.Y. Oct. 7, 2010) (applying New York law and finding lack of jurisdiction where no ongoing business relationship was created).

Accordingly, Plaintiffs fail to establish jurisdiction pursuant to CPLR 302(a)(1).

2. *CPLR 302(a)(2)*

Plaintiffs next argue jurisdiction arises from Defendants' misuse of confidential information obtained from GSC Forwarding. CPLR 302(a)(2) provides jurisdiction over a non-domiciliary who "in person or through an agent commits a tortious act within the state." Although Plaintiffs argue the tort flows from misuse of confidential information obtained by Defendants' agent while in New York, the collection of such confidential information itself was not tortious. The tort arises from the disclosure of confidential information. Here, Plaintiffs fail to allege Defendants disclosed confidential information while located in New York. *See Kramer v. Vogl*, 17 N.Y.2d 27, 31 (1966) (analyzing CPLR 302(a)(2) jurisdiction in relation to fraud claim and finding defendant's act of omission must occur within the state). Therefore, Plaintiffs fail to establish jurisdiction pursuant to CPLR 302(a)(2).

3. *CPLR 302(a)(3)*

Finally, Plaintiffs argue there is jurisdiction over Defendants pursuant to CPLR 302(a)(3). CPLR 302(a)(3) confers jurisdiction over a non-domiciliary when he commits "a tortious act without the state causing injury to person or property within the state" if he

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(1) regularly does business in the state or (2) “expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.” Plaintiffs argue Defendants conducted business in New York through Traxxall and Champlain Capital. However, as noted above, Plaintiffs fail to establish Defendants conducted business in New York.

Nevertheless, Plaintiffs argue they suffered an injury in New York based on GSC Forwarding’s conduct of business in New York and threats to GSC Forwarding’s business and customers in New York. Under the CPLR 302(a)(3) analysis for a nonphysical commercial injury, the situs of the injury is the place where “the original critical events associated with the action or dispute took place, not where any financial loss or damages occurred.” See *CRT Inv., Ltd. v. BDO Seidman, LLP*, 85 A.D.3d 470, 471-72 (1st Dep’t 2011). The Court of Appeals has explicitly held the residence or domicile of the injured party alone is insufficient to establish an in-state injury within the meaning of CPLR 302(a)(3). *Fantis Foods v. Standard Importing Co.*, 49 N.Y.2d 317, 326-27 (1980). There must be “a more direct injury within the State and a closer expectation of consequences within the State.” *Id.* Thus, the fact GSC Forwarding resides in New York is insufficient to establish jurisdiction pursuant to CPLR 302(a)(3).

In *Sybron Corp. v. Wetzel*, 46 N.Y.2d 127 (1978), the Court of Appeals determined that Sybron had suffered a sufficiently direct injury in New York to support jurisdiction under CPLR 302(a)(3)(ii) because the claim was based on more than Sybron’s in-state domicile. In that case, defendant, a nondomiciliary competitor, hired Sybron’s former

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employee to obtain plaintiff's protected trade secrets. The Court of Appeals determined Sybron acquired the trade secrets in New York and defendant threatened to steal plaintiff's important New York customers. *See Sybron Corp. v. Wetzel*, 46 N.Y.2d 197, 205 (1978).

Here, Plaintiffs do not allege Defendants threatened GSC Forwarding's business and customers in New York. The only injury alleged in the Verified Complaint is the interference with the Albion acquisition, which caused Albion's anonymous "strategic partner" to abandon the transaction. Albion is a Virginia limited liability company and no information is provided for Albion's anonymous "strategic partner."

Plaintiffs' argument that Defendants threatened GSC Forwarding's business in New York appears for the first time in Plaintiffs' opposition to the motion to dismiss. Pls' Memo. in Opp. at 12. Even then Plaintiffs do not provide any facts supporting the contention that GSC Forwarding's business in New York would be affected by Defendants' alleged misconduct. Thus, Plaintiffs fail to establish Defendants' tortious act caused an injury to a person or property in New York.

Accordingly, Plaintiffs fail to establish jurisdiction over Defendants pursuant to CPLR 302(a)(3). As this Court determines it has no jurisdiction over Defendants, the Court does not address Defendants other grounds to dismiss the Verified Complaint pursuant to CPLR 327(a) and CPLR 3211(a)(1) and (7).

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IV. Conclusion

ACCORDINGLY, it is hereby

ORDERED, that Defendants' motion to dismiss the Verified Complaint is

GRANTED and it is further

ORDERED, that Plaintiffs' Verified Complaint is dismissed with prejudice.

This constitutes the decision and order of the Court.

Dated: New York, New York
September 13, 2017

ENTER:



Hon. Eileen Bransten, J.S.C.