Segal et al v. Bitar et al Doc. 94

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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STEVE SEGAL, NICK HAMMER, ROBIN HOUGDAHL, and TODD TERRY, on behalf of themselves and all others similarly situated,

Plaintiffs,

Case No. 11-CIV-4521 (LBS)

v.

RAYMOND BITAR; NELSON BURTNICK; FULL TILT POKER, LTD.; TILTWARE, LLC; VANTAGE, LTD; FILCO, LTD; KOLYMA CORP. A.V.V.; POCKET KINGS LTD.; POCKET KINGS CONSULTING LTD.; RANSTON LTD.; MAIL MEDIA LTD.; HOWARD LEDERER; PHILLIP IVEY JR.; CHRISTOPHER FERGUSON; JOHNSON JUANDA; JENNIFER HARMAN-TRANIELLO; PHILLIP GORDON; ERICK LINDGREN; ERIK SEIDEL; ANDREW BLOCH; MIKE MATUSOW; GUS HANSEN; ALLEN CUNNINGHAM; PATRIK ANTONIUS and JOHN DOES 1-100,

Defendants.

- -X

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF
DEFENDANT JOHNSON JUANDA'S MOTION TO DISMISS THE COMPLAINT

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PRELIMINARY STATEMENT

Plaintiffs' opposition brief presents no basis for the assertion of personal jurisdiction as against Defendant Johnson Juanda. In fact, the Plaintiffs in their opposing papers mention Mr. Juanda specifically only once: to single him out as an individual for which the plaintiffs lack any factual basis to assert jurisdiction. This extraordinary admission merits immediate dismissal.

ARGUMENT

I. PLAINTIFFS HAVE FAILED TO ESTABLISH JURISDICTION OVER MR. JUANDA

In support of his motion to dismiss, Mr. Juanda submitted a jurisdictional declaration attesting to his lack of any relevant contacts with the State of New York. Plaintiffs not only fail to controvert any of facts set forth in Mr. Juanda's declaration in their Memorandum of Law in Opposition to Defendants' Motions to Dismiss ("Opposition" or "Opp. Mem."), but in the accompanying Declaration of Thomas H. Burt, Esq. ("Burt Decl."), they state outright that they are aware of no contacts or connections between Mr. Juanda and the State of New York sufficient to exercise jurisdiction over him.

The Opposition itself makes no mention of Mr. Juanda, either directly by name, or even indirectly through a group reference. Although the Opposition makes various arguments concerning jurisdiction about two groups it defines as the "Entity Defendants" and the "Individual Defendants" (and together defined as the "Defendants"), Mr. Juanda is specifically excluded from all of these groups. In particular, the Opposition defines "Individual Defendants" as a series of named individuals, but pointedly excludes Mr. Juanda from the list. Opp. Mem. at 3. Because the Opposition asserts only arguments as against various combinations of the "Entity" and "Individual Defendants," the effect of the exclusion of Mr. Juanda from these categories is that the Opposition fails to make any argument whatsoever with respect to him.

The reason behind this seemingly odd omission becomes crystal clear upon reading the Burt Declaration. That declaration states the factual basis asserted by the plaintiffs for jurisdiction as against the Individual Defendants: they are alleged to have established contacts with New York by playing poker online in tournaments in which New York-based players also participated. *See* Burt. Decl. & Opp. Mem. at 8. The Burt Declaration attempts to support this allegation by citing the results of "Plaintiffs' independent research" and naming instances in which certain Individual Defendants played in online poker tournaments in which players based from New York allegedly participated. *See* Burt Decl. ¶¶ 3-12. However, when it comes to Mr. Juanda, Mr. Burt admits that they cannot even assert this legally insufficient[1] factual basis for jurisdiction. Instead, he concedes that "Plaintiffs have been unable to specifically match . . . Defendant Johnson Juanda to specific Full Tilt online poker tournaments in which New York residents also played." Burt Decl. ¶ 13. In short, not only do Plaintiffs fail to contest Mr. Juanda's declaration concerning the lack of jurisdiction, they openly admit they are unaware of any factual basis to controvert it.[2]

Plaintiffs also improperly attempt to conflate jurisdiction over the Individual Defendants (a category which excludes Mr. Juanda in any event) with jurisdiction over the Entity Defendants. The argument proceeds as follows: plaintiffs begin by asserting jurisdiction with respect to the Entity Defendants on the ground that they allegedly operated a "highly interactive"

[1] The fact that an individual defendant outside of New York accesses a website also located outside of New York and that website happens simultaneously and independently to be accessed by a plaintiff from New York does not constitute "transacting business" by the defendant in New York. *See Appalachian Enters., Inc. v. ePayment Solutions, Ltd.*, 2004 U.S. Dist. LEXIS 24657 at *14 (S.D.N.Y. Dec. 8, 2004) (explaining that a defendant may be found to be "transacting business" and thus potentially subject to personal jurisdiction under CPLR § 302(a)(1) only "[w]here defendants *purposely* avail themselves of the privilege of conducting business in this state, *and* the causes of action arose out of activities occurring *within* the state") (emphasis added).

[2] Plaintiffs also refer vaguely to the defendants' "promotion" of the "Full Tilt brand," Opp. Mem. at 3, presumably referencing the allegations in the complaint that certain individuals wore "Full Tilt" branded clothing and accessories at poker tournaments held outside New York. Compl. ¶¶ 36-48. However, there is no allegation that Mr. Juanda wore such items at events in New York, and his uncontroverted declaration demonstrates otherwise. Such incidental activities would not be a sufficient basis to support jurisdiction, in any case.

website accessed by some New Yorkers, and then, without any further explanation, leap to the baseless conclusion that the mere existence of this website somehow constitutes "doing business" by the Individual Defendants in New York. *See* Opp. Mem. pp. 8-12. Even assuming *arguendo* that operation of the Full Tilt website could be give rise to personal jurisdiction in New York, that argument could apply only to the owners and operators of that website, namely the Entity Defendants. It could not possibly to apply to Mr. Juanda, who is alleged merely to have been an investor in one or more of the Entity Defendants. *See Ontel Prods., Inc. v. Project Strategies Corp.*, 899 F. Supp. 1144, 1148 (S.D.N.Y. 1995) ("In New York, the individual who owns a corporation is generally not subject to personal jurisdiction as a result of the corporation's activities unless (1) the corporate veil can be "pierced" or (2) the corporation acted as an agent for the owner."); s*ee also Lehigh Valley Indus. v. Birenbaum*, 527 F.2d 87, 93-94 (2d Cir. 1975) ("The New York law seems to be clear that the bland assertion of conspiracy or agency is insufficient to establish [personal] jurisdiction."). Plaintiffs, meanwhile, cite no case in which a mere investor in an entity, with no alleged personal business interactions in New York, has ever been found subject to jurisdiction in New York based on activity carried out by the entity through its website.

Hsin Ten Enter. USA v. Clark Enters., 138 F. Supp. 2d 449, 456 (S.D.N.Y. 2000), cited by the Plaintiffs (Opp. Mem. at 10-11), aptly demonstrates the fundamental flaws in their argument. In *Hsin Ten*, the court found that activities conducted through the "interactive" website of the entity defendant was sufficient to constitute "doing business" in New York. 138 F. Supp. 2d at 456. However, the court dismissed the claims asserted against the entity's corporate principal on jurisdictional grounds, holding that jurisdictional allegations sufficient to establish jurisdiction over a company could not be used to hale the company's principal into

court absent specific allegations that the principal, "in his individual capacity, has transacted business in New York." *Id.* at 456-57.

Finally, the Plaintiffs' repeat the complaint's assertion of jurisdiction based on CPLR 302(a)(3)(ii), while simply ignoring the overwhelming authority, cited in Mr. Juanda's moving brief, that establishes that the situs of the alleged injury in this case (alleged conversion of overseas accounts) is outside New York. Plaintiffs instead rely on a single citation to an obviously inapplicable authority concerning determination of the situs of injury that is specific to copyright actions. Opp. Mem. at 12. Moreover, once again, this argument is made solely with respect to the Individual Defendants on the basis of their alleged personal gambling activities with New Yorkers, and thus does not apply to Mr. Juanda.

II. PLAINTIFFS HAVE FAILED TO PLEAD A VALID CLAIM AGAINST MR. JUANDA

Even if Mr. Juanda were subject to personal jurisdiction here, the action would still be subject to dismissal for failure to state a valid claim for relief against him. The Opposition confirms that the complaint does not allege a RICO violation against Mr. Juanda. *See* Compl., Count I. But the only remaining claim—for common-law conversion—does not make any allegations at all with respect Mr. Juanda.

The Opposition acknowledges the failure to make any substantive allegations with respect to Mr. Juanda personally, but in bold defiance of the most fundamental rules of pleading, simply asserts it need not do so. The Plaintiffs' theory is that as long as the complaint alleges some sufficient set of allegations as against some defendant, it can name as many additional defendants as it wishes under the generic, conclusory allegation that "[a]ll Defendants, by virtue of their control and ownership of the Full Tilt Companies . . . are liable for conversion of

Plaintiffs' and class members' monies and assets (the "property") held in Plaintiffs' and class members' Full Tilt Player Accounts." Compl. ¶ 116.

Not surprisingly, the law is quite to the contrary. Even under the liberal pleading standards of Fed. R. Civ. Proc. 8 ("Rule 8"), the complaint must, at a minimum, adequately notify *each* defendant of the actual claims of wrongdoing against *them*. *See Atuahene v. City of Hartford*, 2001 U.S. App. LEXIS 11694 at *2-3 (2d Cir. May 31, 2001) ("Although Fed. R. Civ. P. 8 does not demand that a complaint be a model of clarity or exhaustively present the facts alleged, it requires, at a minimum, that a complaint give each defendant fair notice of what the plaintiff's claim is and the ground upon which it rests.") (internal quotation omitted); *Appalachian Enters., Inc. v. ePayment Solutions, Ltd.*, 2004 U.S. Dist. LEXIS 24657 at *21 (S.D.N.Y. Dec. 8, 2004) ("A plaintiff fails to satisfy Rule 8, where the complaint lumps all the defendants together and fails to distinguish their conduct because such allegations fail to give adequate notice to the defendants as to what they did wrong.") (internal quotations omitted).

The complaint's deficiency is particularly glaring here, where the allegations of the complaint do not suggest any logical inference that Mr. Juanda personally controls or has the power to control the Plaintiffs' funds at issue. On the contrary, the complaint clearly indicates that the accounts in question are controlled by the Entity Defendants, over which Mr. Juanda, who is not presently alleged to be an officer, director or controlling shareholder, cannot reasonably be expected to exercise dominion.

Under these circumstances, Plaintiffs' failure to specify the alleged conduct or wrongdoing of Mr. Juanda renders the complaint fatally deficient. *See Atuahene*, 2001 U.S. App. LEXIS 11694 at *3 (affirming dismissal of complaint for failure to meet the minimum requirements of Rule 8, where complaint "lump[ed] all the defendants together in each claim and

provid[ed] no factual basis to distinguish their conduct"); *Appalachian Enters., Inc.*, 2004 U.S. Dist. LEXIS 24657 at *21-25 (dismissing complaint for failure to satisfy Rules 8 and 12(b)(6) where complaint "[did] not identify any particular defendant that committed any specific act of wrongdoing against plaintiff," but "simply attribute[d] the wrongful acts as being committed collectively by the seventeen defendants," and where "plaintiff ha[d] not identified any specific defendant who is in possession and control of the subject funds to support its claims for replevin and conversion"); *Southerland v. New York City Hous. Auth.*, 2010 U.S. Dist. LEXIS 124716 at *7-10 (E.D.N.Y. Nov. 23, 2010) (denying *pro se* plaintiff's requests for relief and finding complaint deficient in failing "to give the defendants fair notice of plaintiff's claims" where its "statement of facts lists allegations against 'defendants' generally, however, it fails to distinguish defendants' conduct or allege facts against any individual defendant."). Similarly, in *Piven v. Wolf Haldenstein Adler Freeman & Herz LLP*, 2010 U.S. Dist. LEXIS 27609 at *33-34 (S.D.N.Y. March 12, 2010), a complaint asserting conversion and other wrongs against a law firm and individual partners was dismissed as against two of the partners where their names "[did] not appear in any of the Complaint's substantive allegations and appear[ed] only in the descriptions of the parties." *Id.* at *32. While the complaint described their wrongdoing indirectly in allegations attributed to "each defendant," those "generalized allegations were not deemed sufficient to state a plausible claim against these defendants in their individual capacity," *Id.* at 32-33. A similar defect plagues the conversion claim against Mr. Juanda in this action, where Mr. Juanda is not mentioned anywhere in the Complaint's substantive facts, allegations, or claims.

CONCLUSION

For the foregoing reasons, Defendant Johnson Juanda's motion to dismiss the Complaint should be granted.

Dated: September 30, 2011
New York, New York

Respectfully submitted,

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