

ABKCO Music & Records, Inc. v Montague

2006 NY Slip Op 30726(U)

April 15, 2006

Supreme Court, New York County

Docket Number: 110349/05

Judge: Emily Jane Goodman

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

ABKCo Music & Records
Inc

- v -

Montague

MOTION INDEX NO. 11 0349/05
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

| PAPERS NUMBERED |
|-----------------|
| _____ |
| _____ |
| _____ |

Cross-Motion: Yes No

The motion and cross motion are decided in accordance with the attached decision

FILED
APR 18 2006
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/15/06

[Signature]
J.S.C.
EMILY JANE GOODMAN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----x
ABKCO MUSIC & RECORDS, INC.,

Plaintiff,

Index No. 110349/05

-against-

NATHANIEL MONTAGUE, ROSE T. CASALAN,
and THE MONTAGUE-CASALAN FAMILY TRUST,

Defendants.

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NEW YORK
COUNTY CLERK'S OFFICE

-----x
Emily Jane Goodman, J.:

In this breach of contract action, defendants Nathaniel Montague, Rose Casalan and the Montague-Casalan Family Trust move, pursuant to CPLR § 3211(a)(8), for an order dismissing the complaint for lack of personal jurisdiction. Defendants also move, pursuant to CPLR § 3211(a)(7), for an order dismissing the complaint for failure to state a cause of action. Plaintiff ABKCO Music & Records, Inc. cross-moves, pursuant to CPLR § 3025, for leave to file and serve an Amended Complaint. For the reasons stated below, the motion and cross-motion are held in abeyance and the issue of personal jurisdiction is referred to a Special Referee to hear and recommend.

According to the Complaint, Montague and Casalan are residents of Nevada and the Family Trust was organized in Nevada. Defendants

are the owners of an extensive collection of African artwork, including art, books and memorabilia. ABKCO is a New York Corporation which does business in the music and film industries.

ABKCO alleges that sometime in 1997, it and the defendants orally agreed that ABKCO would use its New York office to advance funds to the defendants as needed for the purpose of photographing, cataloging, insuring and advertising the art collection.

The Complaint states that between August 1, 1999 and March 4, 2005, ABKCO made numerous loans to the defendants in the form of payments directed to the defendants or to third-parties at the defendants' direction. The Complaint states that the funds for the loans originated in ABKCO's New York bank accounts and that defendants' communications with respect to the loans were directed to ABKCO's New York offices. The parties allegedly agreed that defendants would repay the loans upon ABKCO's demand for payment.

ABKCO commenced this action in July of 2005, asserting claims for breach of contract and unjust enrichment, based on defendants' alleged failure to repay the loans. Defendants now move to dismiss for, among other things, lack of personal jurisdiction. Plaintiff cross-moves, pursuant to CPLR 3025, for leave to amend the Complaint.

The threshold issue here is whether defendants are subject to

personal jurisdiction in New York. It is undisputed that none of the defendants are New York residents. However, plaintiff asserts that defendants are subject to long-arm jurisdiction pursuant to CPLR 302(a)(1).

CPLR 302(a)(1) provides that the court may exercise personal jurisdiction over any nondomiciliary 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) is a 'single act statute' and, as such, one transaction will suffice to confer jurisdiction over the defendant if such defendant's activities in this State were purposeful and there exists a substantial relationship between the transaction at issue and the claim asserted." Bunkoff General Contractors Inc v State Auto Mut Ins Co, 296 AD2d 699 [3d Dept 2002].

It is well-settled that the plaintiff bears the burden of proof on the issue of jurisdiction. See, Opticare Acquisition Corp v Castillo, 25 AD3d 238 [2d Dept 2005]. "Such burden, however, does not entail making a prima facie showing of personal jurisdiction; rather, plaintiff need only demonstrate that it made a 'sufficient start' to warrant further discovery." Bunkoff General Contractors Inc v State Auto Mut Ins Co, 296 AD2d 699 [3d Dept 2002]; see, Ying Jun Chen v Lei Shi, 19 AD3d 407 [2d Dept 2005].

Here, the Complaint and proposed Amended Complaint set forth the terms of the various loans and the years in which they were allegedly made. Neither pleading sets forth sufficient factual allegations of actions by defendants to support a finding of jurisdiction in New York. However, in support of the cross-motion and in opposition to the motion, ABKCO submits affidavits from Jody Klein, Kenneth Salinsky and Iris Keitel, all of whom are Senior Vice-Presidents of the company. These affidavits each assert that the defendants traveled to New York on at least ten occasions to meet with one or more of the affiants at ABKCO's offices regarding the art collection.

The affidavits also describe the business that defendants conducted in New York through ABKCO in connection with the Art Collection, including arranging for it to be photographed, catalogued, insured, advertised and appraised. Contrary to defendants' argument, Tepplin v Manafort (81 AD2d 531 [1st Dept 1981]) does not hold that affidavits cannot be used to supplement facts in a complaint to support the existence of personal jurisdiction. That case merely concluded that the complaint and the affidavits in opposition to the motion were insufficient to establish jurisdiction.

Based on the affidavits submitted, and the allegations in the

Complaint, ABKCO has made a "sufficient start" and demonstrated that facts may exist which support a finding of jurisdiction over the defendants in New York. See, Ying Jun Chen v Lei Shi, 19 AD3d 407 [2d Dept 2005]; Bunkoff General Contractors Inc v State Auto Mut Ins Co, 296 AD2d 699 [3d Dept 2002]. Therefore, a hearing is required to determine whether facts supporting jurisdiction exists. See, Cliffstar Corp v California Foods Corp, 254 AD2d 760 [4th Dept 1998]. Accordingly, it is

ORDERED that the issue of whether facts supporting personal jurisdiction exists over the defendants is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

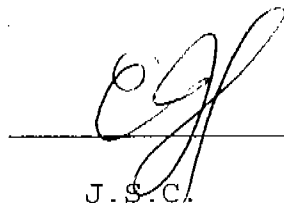
ORDERED that the motion and cross-motion are held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Judicial Support Office to arrange a

date for the reference to a Special Referee.

DATED: April 15, 2006

ENTER:

A handwritten signature in black ink, appearing to read 'E.J.G.', is written over a horizontal line.

J.S.C.

EMILY JANE GOODMAN

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