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SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 9 SUFFOLK COUNTY

INDEX NO.: 8587-12

PRESENT:
HON. DANIEL MARTIN

Motion Dates :10/03/12, 02/19/13,
Submitted: 03/05/13
Motion Sequence Nos.: 01 **-MG**
02 **-MotD /case disp.**

JOAN BLOOMGARDEN and CHARLES BLOOMGARDEN,

Plaintiffs,

-against-

ANTHONY LANZA and LANZA & GOOLSBY, P.L.C., *Et al*,

Defendants.

PLAINTIFF'S ATTY:
Stanley E. Orzechowsik, Esq.
38 Southern Boulevard, Ste. 3
Nesconset, NY 11767

DEFENDANTS' ATTY:
Kaufman Dolowich Voluck & Gonzo, LLP
135 Crossways Park Drive, Ste. 201
Woodbury, NY 11797

The following named papers have been read on this motion:

Notice of Motion/Order to Show Cause	X
Cross-Motion	X
Answering Affidavits	X
Replying Affidavits	X

The defendants, ANTHONY LANZA, LANZA & GOOLSBY, P.L.C. a California Professional Law Corporation, and LANZA & SMITH, P.L.C. a California Professional Law Corporation, (collectively referred to herein as the defendants or movants), move for an order: (1) pursuant to CPLR 3211(a)(8) dismissing the complaint on the ground of lack of personal jurisdiction; or, in the alternative (2) staying the proceedings and compelling arbitration in Orange County California. Plaintiffs cross-move for an order pursuant to CPLR 2201, 3211(a) and (b), 301, 302 and 7503(a)(b), and Uniform Rule 216.1 (for the sealing of court records): denying the defendants' pre-answer motion to dismiss or stay the proceeding.

Plaintiffs commenced this action seeking to recover damages for legal malpractice, breach of contract, fraud, fraudulent concealment, breach of the covenant of good faith and fair dealing, and breach of fiduciary duty, which allegedly resulted from the defendants' representation of plaintiffs and their son, Howard Bloomgarden, in a suit against another attorney in the State of Florida relating to her retention by the plaintiffs to handle two matters relating Howard Bloomgarden's plea/conviction on various criminal counts and the return of fees paid. The Florida action, under the

title: BLOOMGARDEN v ROBERTA MANDEL, et al., sought to recover from the attorney for breach of contract, breach of covenant of good faith and fair dealing, unjust enrichment, breach of fiduciary duty, professional malpractice, and fraud, all concerning Ms. Mandel's efforts to relieve Howard Bloomgarden of the consequences of a federal criminal court plea allocution, based on lack of effective counsel by yet another attorney, for which he was, and is, serving 33 and 3/4 years sentence and upon which he potentially would face two capital murder prosecutions in the State of California.

The complaint at issue in this action contains seven designated causes of action. No nexus to the any activity in the State of New York is alleged in any of the designated causes of action. The only purported mentions of a nexus to the State of New York are contained in the "Predicate Allegations" of the complaint where it is alleged, in apparent an apparent attempt to invoke long-arm jurisdiction, that the defendants conducted business in this State, and specifically, at paragraph 23, in reference to the defendants:

> 23. In entering into the retainer agreement and professional and attorney-client relationship as aforesaid, the Defendants and each of them did so by means of, for the purpose of, and in the course of, doing and transacting business with the Plaintiffs within the state of New York and contracting to supply and perform legal services for the Plaintiffs in the State of New York.

It is also alleged, in paragraph 24, that the defendants:

> . . . committed negligent and tortuous acts without the State causing injury to the Plaintiff(s) and their property within the State of New York and did so by and in the course of regularly doing and soliciting business in the State of New York, engaging in a persistent course of conduct having regular and continuing contacts with the State of New York; and deriving substantial revenue from services rendered delivered or performed in the State of New York; with the expectation that the acts would have consequences in the State of New York and that said Defendant(s) would still derive substantial revenue from their conduct, contacts and participation in interstate commerce.

These allegations in the complaint are not further amplified with specific factual allegations.

In arguing that this court may exercise jurisdiction over the defendants, plaintiffs rely upon New York State's long-arm statute, CPLR 302. That statute provides, in pertinent part, that:

> (a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:
> 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or

2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or

3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, 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; or

4. owns, uses or possesses any real property situated within the state. (CPLR 302.)

In support of their motion, the defendants rely upon an affirmation from counsel and affidavit of the defendant Anthony Lanza, together a copy of the retainer agreement among the parties, to argue that this court may not properly maintain personal jurisdiction over them. More specifically, they assert that the firm is headquartered in the State of California, with only one office in Irvine, California. The defendants do not maintain an office in New York, do not regularly conduct business in this state, and do not own any property here; all are residents of California, none is licensed to practice law in New York, nor do they have any affiliates, subsidiaries, or employees conducting or soliciting business in New York, no agents upon whom process could be served. They have not appeared before the courts of New York, do not maintain bank accounts or a telephone listing in New York nor advertise here. They do not receive income for services performed in New York. Service of process informing the defendants of the commencement of this action was received by them in Irvine, California Further, the underlying action that forms the basis for the claim of malpractice was prosecuted in the State of Florida. No services were performed with regard to Florida action in the State of New York. The defendants never traveled to New York in connection with the Florida action; their only communications with plaintiffs were by telephone, e-mail and letter. The defendants were retained by Howard Bloomgarden to represent him in litigation to be commenced in Florida, Howard negotiating the retainer from his prison cell in Los Angeles, California, and his parents, the plaintiffs here, were later added as parties to the agreement.

The written fully executed retainer agreement with plaintiffs provided as here relevant:

CONTINGENCY HYBRID FEE AGREEMENT

This Agreement (the "Agreement") is effective in Orange County, California, by and between Lanza & Goolsby, a Professional Law Corporation ("LG"), and Howard Bloomgarden, Dr. Charles BLOOMGARDEN, and Dr. Joan Bloomgarden (collectively, "Client").

1, Scope of Representation. Client hereby hires LG to represent Client in the filing and prosecution of a lawsuit in Florida (or perhaps California) against attorney Roberta Mandel, including any appropriate law firm responsible for her acts or omissions, relating to her retention by Client to handle two matters relating to Client's plea/conviction on various criminal counts, the first involving a $200,000 fee/deposit and the second involving a $30,000 fee/deposit (the "Matter"). . . . LG's representation is limited to the matter. . . .

. . .

> 9. LG and client agree that any disp8ute or claim in law or equity arising between them whatsoever, including, but not necessarily limited to, any act or omission of LG or any of it employees relating to the services rendered by LG to Client, whether under this Agreement or otherwise, shall be decided by neutral, binding arbitration in Orange County. The arbitration shall be conducted in accordance with Part3, Title 9 of the California Code of Civil Procedure, Section 1280, et. seq. . . .

Thus, defendants have presented a prima facie showing on the lack of New York long-arm jurisdiction over them, given the lack of specific factual allegations contained in the complaint.

To successfully oppose a pre-answer motion to dismiss a complaint pursuant to CPLR 3211 (a) (8), the plaintiffs must make a prima facie showing of specific allegations which demonstrate the applicability of the provisions of CPLR 302, supra. ***Iavarone v Northpark Partners, LP***, 89 AD3d 902 (2nd Dept 2011), ***Opticare Acquisition Corp. v Castillo***, 25 AD3d 238 (2nd Dept 2005). While the court must construe the pleadings and affidavits in the light most favorable to plaintiffs, the burden of proof rests with the party asserting jurisdiction. ***Brandt v Toraby***, 273 AD2d 429 (2nd Dept 2000).

Plaintiffs, here by counsel's affirmation in opposition, respond to the CPLR 3211 (a)(8) motion without specificity. They maintain that: the written contract was not a negotiated retainer agreement; that the defendants by virtue of the contract derived substantial income from interstate commerce as a result to their representation of the plaintiff; defendants engaged in a persistent course of conduct in the state with the expected consequences in the state as to the plaintiffs who were residents of the State of New York and who were possessed of causes of action which were personal to them within this state. The damages to the plaintiffs' personal causes of action, and the direct injury and financial damage to these plaintiffs occurred where their causes of action were and are possessed in this state, because the multiple forms of communication utilized by the defendants in their representations of the plaintiffs including their primary utilizations of email communications over the internet; that they committed tortious acts outside this state causing injury to the plaintiffs in their personal and property within this state; given the fact that the retainer agreement was executed in the State of New York by the plaintiffs, the defendants contracted for the supply of services within this state; the defendants sent billing notices to the plaintiffs in the State of New York which were paid from New York

Each plaintiff submits an affidavit alleging particulars with regard to long-arm jurisdiction. They attest that they were presented "with the retainer agreement at issue" . . . "through interstate mail." Further they "signed the retainer agreement, including the arbitration clause, in the State of New York," and, "Thereafter, all of our communication with the Defendants in this litigation took place via interstate communications sent and delivered on a regular basis into New York, namely 1) interstate mail, 2) interstate telephonic communication and 3) e-mail communication over the internet. Included within those communications were notices and billing statements sent to us by the Defendants detailing the work and tasks they have performed, or allegedly performed."

Thus the only allegations of a long-arm nexus to New York contained in plaintiffs' opposition sound in paragraphs (1) and (3) of CPLR 302(a). No allegation as to paragraph (2) - a tortious act

within New York; or, paragraph (4) - the ownership of real property in New York, is made and therefore the court need not consider them.

Defendants' contention that they have not transacted business in New York State sufficient to subject it to long-arm jurisdiction under CPLR 302 (a)(1) is correct. Essential to a determination that a defendant has "transacted business" within the State as required by this subdivision is a finding that a defendant has purposefully availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws ***Kreutter v McFadden Oil Corp***., 71 NY2d 460 (1988), ***Cornely v Dynamic HVAC Supply, LLC***, 44 AD3d 986, (2nd Dept 2007), . "Purposeful activities are those with which a defendant, through volitional acts, avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws " Fischbarg v Doucet, 9 NY3d 375 (2007). As is of particular relevance here, it has also been held telephone calls and written communications, which generally are held not to provide a sufficient basis for personal jurisdiction under the long-arm statute, must be shown to have been used by the defendant to actively participate in business transactions in New York. ***Liberatore v Calvino***, 293 AD2d 217 (1st Dept 2002). Sending faxes and making phone calls to this state are not, without more, activities tantamount to "transacting business" within the meaning of the long-arm statute. ***Warck-Meister v Lowenstein Fine Arts***, 7 AD2d 351 (1st Dept 2004). It has also been held that where a defendant has signed a contract outside of this State, a court cannot exercise jurisdiction over that defendant pursuant to CPLR 302 (a) (1) based simply on the circumstance that the plaintiff signed in New York. ***Standard Wine & Liq. Co. v Bombay Spirits Co.***, 20 NY2d 13 (1967). In like fashion, it has been held that where the services contracted for are to be performed outside of New York, the mere fact that a party to the contract is a New York domiciliary does not suffice to invoke the court's jurisdiction pursuant to CPLR 302 (a) (1) ***Finesurgic Inc. v Davis***, 148 AD2d 414 (2nd Dept 1989), lv dismissed in part and denied in part 74 NY2d 781 (1989). Nor does jurisdiction lie where all New York activities relating to a contract were performed by plaintiff and cannot be attributed to the defendant. ***J.E.T. Advertising Associates, Inc. v Lawn King, Inc***., 84 AD2d 744 (2nd Dept 1981).

The facts, as presented by plaintiffs, do not permit the conclusion that defendants were doing business in New York in the instant case where defendant law firm was retained in California by plaintiffs as counsel in the Florida malpractice litigation, under an agreement calling for dispute resolution in California. Construing the pleadings and affidavits in the light most favorable to plaintiffs, they have not met the burden of proof in making a prima facie showing of specific allegations which establish personal jurisdiction under CPLR 302 (a)(1).

Plaintiffs other claim that jurisdiction is obtained under the "tortious act" provision of CPLR 302 (a)(3) is without merit. This provision, among other things, insofar as pertinent, requires that plaintiff show that defendant committed a tortious act: "without the state causing injury to person or property within the state". It is necessary for plaintiffs then to show that they sustained an injury within the State of New York. ***Vamosy v Gateway Ins. Co.***, 49 AD2d 489 (3rd Dept 1975). This they have failed to do. Plaintiffs may have suffered a pecuniary diminution, but their domicile in New York alone does not establish injury in New York . ***Fantis Foods v Standard Importing Co.***, 49 NY2d 317 (1980), ***Weiss v. Greenberg, Traurig, Askew, Hoffman, Lipoff, Quentel & Wolff, P.A.***, 85 AD2d 861 (3rd Dept 1981), ***Cliffstar Corporation v California Foods Corporation***, 254 AD2d 760 (4th Dept 1998). Since any alleged acts of legal malpractice took place in Florida, and were related to the Florida litigation, it cannot be said that injury was sustained in New York simply

because the plaintiffs may suffer a monetary loss. Therefore, that plaintiffs have not established personal jurisdiction over defendants under CPLR 302 (a)(3).

Accordingly, the defendants' motion to dismiss the action as against them pursuant to CPLR 3211(a)(8) is granted.

In light of this disposition on the foregoing grounds, it is unnecessary to reach any other issues raised by the parties, as the court is without jurisdiction.

So ordered.

Dated: June 5, 2013
Riverhead, NY

HON. DANIEL MARTIN, A.J.S.C.